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MADRAS LAW JOURNAL.

I] JANUARY. [1953

ANDHRA STATE

By

K. S. SANKARA AIYAR, *Advocate, Madras.*

On division, Madras State will continue as before, but with territory diminished, and the Andhra State will be formed under Article 3 (*a*) by separation from the Madras State of the Andhra Districts. On separation, Andhra State may be either a Part A State or Part C State. If the former, it must have a Governor and a High Court. If the latter, it will be governed by the President acting through Chief Commissioner, or Lieut. Governor or the Governor of a neighbouring State; if administered through Chief Commissioner or Lieut. Governor, it will have a Legislature or Council of advisers or both, and a High Court created for it or any Court in that State declared to be High Court. The Parliament may extend the jurisdiction of the High Court of Part A State to Part C State, in which case the jurisdiction of the Madras High Court may be extended to Andhra State also. But Andhras will not consent to have their State a Part C State.

If it is a Part A State, it must have a Governor and a High Court. Part VI of the Constitution applies to Part A States. It contains Article 153 which provides that there shall be a Governor for each State and Article 214 which provides that there shall be a High Court for each State. The specific provision excludes the possibility of one Governor and one High Court for two Part A States; for then each will not have a Governor and a High Court. The analogy of British Crown cannot apply, for there the Sovereign occupies a unique position as the Constitutional Head of many Governments. Can a single person occupy the position of Governor of two States? Article 158 (2) provides that the Governor shall not occupy any other office of profit. The Governor of Madras State will occupy an office of profit if he accepts the Governorship of Andhra State also. Under the Constitution the Executive power of the State vests in the Governor. If the Executive power of two States should vest in a single Governor it will give rise to a confusion in the exercise of those powers. Such Executive power extends to all matters with respect to which the Legislature of the State has power to make Laws. Each Legislature can make Laws only for itself and not for the other. If one Legislature made some Laws and the other did not, or the other made Laws to the contrary, what is the Government to do? The Governor is to be advised by a Council of Ministers. Where their interest conflicted, if the Ministers of one State advised one way, and the Ministers of the other the other way, what is the Governor to do? Under Article 168 (1), the Governor is a component part of the Legislature. When the Legislatures are different for the two States, can they have a single Governor as the component part. If one Legislature passed one Bill and another Legislature passed a different Bill, is the same Governor to assent to both? If one Legislature sat and the other did not, can the Governor promulgate any Ordinance? Is he to play the part of Jekyll and Hyde? The above are a few of the considerations

which clearly demonstrate that having a single Governor for two States is inconsistent with the Constitution.

The provision that there shall be a High Court for each State rules out the possibility of a single High Court for two Part A States. But Article 230 contains provisions which allow a High Court of one State to exercise jurisdiction over another State and Article 232 makes provision for such a contingency. The consequence is that the Governor of the State in which the High Court has its principal seat shall have the powers conferred on him by part V and the consolidated fund with reference to such High Court with such extended jurisdiction will be the consolidated fund of the State in which that High Court has its principal seat. In the present case as the High Court will have its principal seat in the Madras City, the State of Madras will have the power to be consulted as to the appointment of District Judges of the Andhra State and to exercise control over Subordinate Courts of the Andhra State. It is not likely that Andhras will consent to this. The said Articles are intended to cover cases such as East Punjab and Delhi where a High Court of a Part A or Part B State has jurisdiction over the Courts of a Part C State.

If for Andhra there should be a separate Governor and a separate High Court can they be located at Madras? If so located, the Governor and Judges would be amenable to the jurisdiction of the Madras State as its subjects which will be anomalous. Will the Andhra High Court have no original jurisdiction? Unless they are specifically excluded, the Courts in Madras will have jurisdiction over them. Art. 227 vests in the High Court powers of Superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. The fiat of the one court will be available over the other. Where will be the principal seat of the Andhra High Court and how will Articles 230 and 232 affect the powers and jurisdiction of the State of Madras and its Governor over such a High Court?

The problem will not be solved by converting the Madras City into a Part C State, but on the other hand it will become more complicated, for then, instead of two States having a single capital it will be three States having a single capital. A Part C State will be administered by the President and Madras and Andhra States by their respective Governors. If all of them were to be located in the same city, the confusion will become all the greater. If the State of Madras were to have another capital in Tamil Nad, and the Andhra State to have its own capital in the Andhra State and Madras City be constituted into a Commissioner's Province, the result may only be that the city will be shorn of its importance, but it will solve no problem nor do good to anyone, but, on the other hand, it may do infinite harm to South India.

If Madras City can be the seat of Madras and Andhra States, why should not Hyderabad, which the Andhras expect may become their future capital, be now made the seat of its present capital?

THE

MADRAS LAW JOURNAL.

I] FEBRUARY. [1953

VILLAGE OFFICES IN THE STATE OF MADRAS—SEX IF A DISQUALIFICATION.

By

P. VENKATARAMANAMURTHY, *Advocate, Ramachandrapuram, East Godavari District.*

The earliest provision in the Madras State as to village officers was the Madras Karnams Regulation (XXIX of 1802).

Section 7 of that Regulation provided as follows :—

" In filling vacancies of the office of Karnam the heirs of the preceding Karnam shall be chosen by the landholders concerned except in the case of incapacity on proof of which before the Judge of the Zilla the said landholders shall be free to exercise their discretion in the nomination of persons to fill vacancies."

This Regulation XXIX of 1802 ceased to be in force after the passing of the Madras Hereditary Village Offices Act and the Madras Proprietary Estates Village Service Act. These two Acts repealed the Madras Regulation (VI of 1831) which was the law governing the village officers in the Madras State formerly. Regulation VI of 1831 did not prohibit the appointment of women to any hereditary village office.

The Board's Standing Order 154 (24) runs as follows :—" Appointments made under Regulation VI of 1831—Appointments to village offices properly made prior to the introduction of the Madras Proprietary Estates Village Service Act (II of 1894) or the Madras Hereditary Village Offices Act (III of 1895) can be questioned only on the ground of inferior title and not on that of sex or other disability for the first time removed or created by those Acts."

The oldest reported decision regarding women as village officers is *Alymalammal* v. *Venkataramanayya*[1], wherein it is held that women were not entitled to the office of Karnam, though they have been, and sometimes are allowed to fill the office nominally.

In *Venkataratnamma* v. *Ramanujasami*[2], their Lordships of the Madras High Court followed the above decision and held that sex has been regarded as incapacitating women from office. Their Lordships were not prepared to reverse the above decision so long regarded as authoritative and so obviously reasonable and expedient on public grounds.

1. S.D.A. Decisions (Madras), 1844, page 85.   2. (1880) I.L.R. 2 Mad. 312.

The two above decisions were confirmed by a Full Bench of the Madras High Court in *Venkata* v. *Rama*[1] in a case under Regulation VI of 1831 and Madras Act IV of 1866. Referring to *Venkataratnamma* v. *Ramanujasami*[2], the Chief Justice observed that it must be taken until those decisions are overruled, that in the case of permanently settled estates inability by reason of age or sex to discharge personally the duties of the office is a sufficient disqualification. The Board of Revenue properly considered that hereditary claims should be recognized to the extent to which Regulation XXIX of 1802 had allowed them.

In *Chandramma* v. *Venkataraju*[3], a case under section 7 of Regulation XXIX of 1802, their Lordships followed *Venkataratnamma* v. *Ramanujasami*[2] and *Venkata* v. *Rama*[1]. Their Lordships held in this case that a woman could not hold the office of a Karnam and that when the immediate heir was incapacitated the nearest Sapinda of the deceased Karnam was entitled to succeed to the office.

Abdukuri Venkataramadas v. *Pachigolla Gavarraju*[4] is an authority for the proposition that enfranchisement of service inams in the name of a widow makes those inams her Stridhana property. This decision is important for the reason it throws much light on the question of women as village officers.

Regulation VI of 1831 did not actually prohibit the appointment of women. But the Board's Standing Orders which guide the proceedings of Collectors in making a proper selection declared that females should be excluded from the succession on the ground that they were obviously incapable of performing those duties. But they did not exclude persons claiming through females.

According to sections 10 and 11 of the Madras Hereditary Village Offices Act, no person is eligible for a village office of Class I if such person is not of the male sex.

The President of India exercised his powers under Article 372 (2) of the Constitution of India and passed the Adaptation of Laws (Amendment) Order, 1950, dated 5th June, 1950, in his Constitution Order, No. 17 whereby the words "*is not of the male sex*" in sections 10 and 11 of the Act were omitted with retrospective effect from the 26th January, 1950. Thus there has been no sex disability since the 26th January, 1950, for a woman to hold a village office of Class I.

The Board of Revenue ought to have amended the relevant Standing Orders and issued necessary instructions to the Revenue Courts and Revenue Officers to implement the above fundamental right of women.

But the Board of Revenue seems to have taken the view that women are still barred from succeeding to such offices on account of section 10 (2) of the Act—

"The succession shall devolve on a single heir according to the general custom and rule of primogeniture governing succession to impartible Zamindaries in South India."

Though Articles 14 and 15 of the Constitution recognise the right of equality and prohibit discrimination on the ground of sex, this discrimination is still continuing in the Law of impartible estates, and consequently under this Act also, in spite of the above, Constitution Order.

If two sections of the same Act are repugnant to each other the cardinal principle of interpretation of statutes is to give a harmonious construction of both the sections, but the present case is not such.

Hence it may be pointed out that the Legislature should amend section 10 (2) of the Act suitably at a very early date so as to give full effect to this fundamental right of women. Until then the remedy of aggrieved women is only by way of petitions to the High Court under Article 226 of the Constitution.

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1. (1884) I.L.R. 8 Mad. 249 (F.B.).
2. (1880) I.L.R. 2 Mad. 312.
3. (1887) I.L.R. 10 Mad. 226.
4. (1922) 43 M.L.J. 153.

LEGAL PRACTICE BY EX-JUDGES.

By

P. N. Subrahmanya Ayyar, M.A., B.L., *Advocate, Tiruchirapalli.*

The recent resolution by the Executive Committee of the Provincial Bar Federation that the Judges should not be allowed to practice in any of the Courts after their tenure of office is quite welcome and would, I hope, be properly appreciated by all concerned. To allow the Judges to practice again in the Courts after their tenure of office, would not only militate against the high dignity of office of a Judge, but would also embarrass the other Judges and the members of the Bar, and I fear, the retired Judge himself may not feel his position very happy and comfortable and may have to form a category by himself. If the principle is to attract the best talent from the Bar, this would be a poor solace. Best talent would always be available if it is flavoured with a sense of sacrifice and service to the country, and if the age limit is extended to sixty five years and if the dignity of the office is well maintained. Many of our revered leaders are between sixty and seventy years and they are serving our country, most efficiently and with youthful vigour. It looks as though they become young again after sixty. There can be no objection therefore to the age limit being extended to sixty-five years.

REVISION AGAINST AN ORDER OF DISCHARGE—WHEN TO BE MOVED.

By

S. N. Patnaik, M.A., *Assistant Public Prosecutor, Srikakulam District.*

In the latest decision on the subject by His Lordship Justice Govinda Menon the desirability is suggested of waiting till the final disposal of the case, in the matter of moving a revision against what may be called a partial discharge. The said pronouncement of the Madras High Court in the case reported in *Jayaram*, In re[1], is a short one, and at the relevant parts of the *dictum* His Lordship has laid down thus : " . . . . . In my opinion, the proper time at which the propriety of a discharge like the one in question here, can be agitated in revision is only after the Court of enquiry or trial has finally disposed of the matter . . . ." " . . . . . . As a matter of practice and convenience it would always be better if the applications by the prosecution for setting aside orders of discharge in cases where charges have been framed against some of the accused alone, or against all the accused under some sections alone, were made only after the Court finally disposes of the matter' . . . . . ." How far this suggestion can be supported in law, and the consequence, in practice of following the suggestion may be worth while to be considered on a few out of several aspects of the matter.

(1) This suggestion is not supported by any reasoning to show that it is made or given in accordance with the existing law of Criminal Procedure or in the interests of justice according to law. Yet it seems to lay down what it could not have done except by means of or with the help of an express provision of law to that effect. It provides on the one hand a legal basis or authority for the delay—that could not have been otherwise condoned—, of a varying period for each case, in filing a revision petition with regard to a specified class of criminal cases as distinguished and discriminated from the others, while all are subject to the same procedure in law. On the other hand it also provides a legal authority or basis for an objection—that could not otherwise be raised—against filing a revision peti-

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1. (1948) 1 M.L.J. 341 : 49 Cr.L.J. 597.

tion during the pendency of the rest of the case or of the case against the rest of the accused.

(2) This ruling relies on a former pronouncement of the same High Court in *Govindaraju* v. *Emperor*[1]. That former decision however had only considered about the need of reasons for an order at the stage of discharging some of the accused or omitting to frame some of the charges against them. The legal necessity or desirability for the prosecution to wait till the final disposal of the case, in questioning such a discharge order, was not considered by his Lordship Justice Venkataramanarao in that decision.

(3) The relevant provisions of the Criminal Procedure Code—sections 435 to 437—do not prohibit, and no other provision in the Code is calculated to discourage, moving a revision against a discharge order—or of any order of a subordinate Criminal Court—as soon as it is passed. On the other hand the revision by the District Courts has been specifically and specially—I think, in a safe and salutary manner—provided for, in respect of discharge and dismissal orders passed by the Courts subordinate to them. Even the Court of the Sub-Divisional Magistrate under section 435, Criminal Procedure Code, is empowered to call for the records of any proceeding before a Court subordinate to it in order to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court. The nature and extent of relief that may be ordered by the District Magistrate, or Sessions Judge in such matters with respect to cases pending in lower Courts is clearly stated in sections 436 and 437, Criminal Procedure Code, only to be availed of, asked for and obtained. There is no need or desirability indicated in law to wait for the final disposal of the case, in order to move for the kind of relief that may be suitable or proper to obtain, during pendency of the proceedings in the lower Court. The relief to be effective, just and useful for the State or the party concerned in the criminal proceedings, has got to be sought and obtained not only properly and legally, but also promptly and at proper time.

(4) In waiting for the result of the rest of the case or the case against the rest of the accused, the accused who is (or are) discharged, and the prosecution too are needlessly left in suspense about the prospects of that part of the case ending in discharge. The accused so discharged is likely to be prejudiced for no fault of his if prosecuted after the case against the other accused is finally disposed of, not only on account of the needless delay, but also due to the competence of his co-accused then to depose against him as witnesses, and fixing up of further evidence for prosecution in his absence so as to be of some use or abuse against him later on —as would not have been normally available—when further inquiry may be ordered in respect of the discharge order, passed by the lower Court in his favour. On the other hand the prosecution has the disadvantage of allowing such accused the competence of his co-accused to depose in his favour, and the time as well as material that would not have been available for him in the normal course if his discharge order was set aside in time, and proceedings continued along with him.

(5) Even considering the interests of the accused who is so discharged while his co-accused continue to be tried, it would be unfair to him that the discharge order remains to be considered and may be revised only after the rest of the case is (or accused are) conclusively dealt with. This may be clear when such an accused is sought to be examined for prosecution or for defence or by Court—and nothing in law prevents such examination—during the rest of the proceedings in the case continued against the other accused. It would place him in an unenviable position of deposing on oath as a witness in a matter which may be judicially considered, later on, againat him when he appears as an accused.

(6) The difficulty may also arise of having to ignore the legal advantage (or disadvantage) of a joint trial (as effected by sections 10, 30 of the Indian

1. (1938) M.W.N. 38 : 39 Cr.L.J. 335.

Evidence Act, etc.) in suitable cases, for no fault of the parties concerned, and entirely on account of this suggested desirability of waiting.

(7) In cases wherein section 437, Criminal Procedure Code is applicable this suggestion to wait would expect the Sessions Court also to wait for its own disposal in the rest of the case, which naturally leads to prejudice—not intended in law or fact—in the hearing of the revision petition and in the commitment that may have to be ordered in respect of the accused improperly discharged.

(8) In effect, again the ruling seems now to deprive the prosecution of its former freedom and facility or to restrict its responsibility, of being guided by its own good sense and best interests in accordance with law in the matter of moving a revision against a discharge order.

In waiting for the result of the rest of the case, therefore, there is no sanction or support of law, while there is possibility of acquiring anomalous and prejudicial attributes for the further proceedings of the case. On the other hand the free and timely access, for what it is worth, to a competent Court may not be discouraged by means of a weighty pronouncement of the High Court, which naturally exercises much legal authority for influencing the filing and disposal of revision petitions under sections 436 and 437, Criminal Procedure Code. It is so, even as a desirability of procedure suggested by the High Court for our guidance, in addition to and apart from the concerned provisions of law. It is humbly submitted therefore that the pronouncement in question in *Jayaram* In re[1] requires reconsideration.

BOOK REVIEWS.

MULLA'S INDIAN CONTRACT ACT (Students' edition) Fifth Edition, 1953: Published by N. M. Tripathi, Ltd., Bombay. Price Rs. 10.

This excellent little commentary on the Indian Contract Act needs no introduction to those in law and commerce. In a short compass the law relating to contracts is expounded so clearly and well and in such an analytical fashion that its utility to students (and lawyers too to a certain extent) cannot be overemphasised. Though the present edition does not contain the commentaries on the Sale of Goods Act and the Partnership Act, it is exhaustive on the Contract Act. It is well also that the two Acts are separately published as they are now independent Acts and no longer part of the Contract Act.

The paragraph heading is quite useful. The table of cases and index are exhaustive. Printing and get-up is all that is desirable. The synopsis is an useful addition.

CONVEYANCING—PRECEDENTS AND FORMS (WITH NOTES) by Shiva Gopal, M.Sc., LL.B., Advocate. Published by Eastern Book Company, Lucknow. Price Rs. 8.

The utility of a book of forms and precedents to a practitioner needs no introduction. Troublesome questions of interpretation of doubtful terms and the intention of parties are avoided by a proper drafting of a deed at the inception. Such precise drafting is attained by conforming to standard forms and precedents which have stood the test of time and have been subject to judicial scrutiny.

This little book contains over two hundred and fifty model forms, arranged under proper subject headings divided into several chapters. A chapter is added giving forms of certain petitions before courts in respect of proceedings arising under Writs, Dviorce, Guardian and wards, Insolvency, etc. Though strictly speaking these forms are not part of a book on Conveyancing, still their inclusion

1. (1948) 1 M.L.J. 341 : 1948 M.W.N. 367 : 49 Cr.L.J. 597.

will be found a useful guide to beginners in the profession. The inclusion of the schedule to the Stamp Act, may not be of lasting value as the book itself, as the stamp duties are often subject to variation in the states.

But it must be added that the value of a book of Forms and Precedents in Conveyancing lies, not in its condensation but in its exhaustiveness. As a guide to students and beginners the book is a useful addition to the existing works on the subject.

PREM'S LAW OF CRIMINAL APPEALS AND REVISIONS by Daulat Ram Prem, Senior Advocate, Supreme Court of India. Arora Law House, Simla. Price Rs. 20.

The author is known to the profession by a number of his publications already in the field. Some of his previous publications have received the good opinion of eminent Advocates and Judges. The present book is without a preface and leaves undisclosed the author's mind in bringing out the book or the back-ground on which it is set.

The first two chapters are obviously intended to be an introduction to the subject dealt with in the book. The remarks of the author on a wide range of a variety of subjects are not beyond controversy. Their utility in a book relating to Criminal Appeal and Revision is not also clear.

Be it as it may, the body of the book relating to Appeals and Revisions in criminal cases are divided into several convenient chapters. The subject dealt with in each chapter is divided into several headings and the relevant case-law is also cited under each subject. The printing and get-up of the book is excellent. Though the subject dealt with in this book is nothing new and is covered by any standard commentary on Criminal Procedure, still the present book as a separate handy volume will be of use to practitioners on this branch of the law.

SUMMARY OF ENGLISH CASES.

GENERAL CLEANING CONTRACTORS, LTD. *v.* CHRISTMAS, (1952) 2 All E.R. 1110 (H.L.).

Master and Servant—Duty to provide safe system of working—Scope of.

If employers employ men on dangerous work for their own profit, they must take proper steps to protect them, even if they are expensive. If they cannot afford to provide adequate safeguards, they should not ask them to do the work at all.

It is the duty of an employer to give such general safety instructions as a reasonably careful employer who has considered the problem presented by the work would give to his workmen.

Common law demands that employers should take reasonable care to lay down a reasonably safe system of work. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts.

The problem is one for the employer to solve and should not be left to the workman. It can be solved by general orders and the provision of appropriate appliances. (*Earl Jowitt, Lord Oaksey, Lord Reid and Lord Tucker*).

(Decision of Court of Appeal in (1952) 1 All. E.R. 39, affirmed.

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PROHIBITION : CONSTITUTIONAL POSITION REGARDING.

BY

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Of late, there has been a spate of pronouncements and writings from diverse sources regarding the validity of scrapping prohibition, and the object of the present note is to present the data on the subject and sum up the *pros* and *cons* of the question, which it may be pointed out, are so nicely balanced that it is somewhat difficult to be dogmatic about the conclusion which can reasonably be reached therefrom.

To appreciate the controversy in its true perspective, it is necessary to some extent to go into the history of the matter. As settled by the Constituent Assembly, Part IV, of the Constitution of India (1950) is headed '*Directive Principles of State Policy*' and Article 36 lays down that

"In this Part, unless the context otherwise requires, 'the State'. has the same meaning as in Part III".

That is 'State' includes Parliament, State Legislatures, Union and State Governments and Local authorities, etc. Article 37 says:

"The provisions contained in this Part shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws."

Article 47 lays down that the State shall regard the raising of the level of nutrition, etc., as among its primary duties and goes on to say that

"in particular, the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health."

One has to go back to the Supplementary Report of the Advisory Committee on the subject of Fundamental Rights (presided over by Sardar Patel and presented on 30th August, 1947) to locate the source of the present articles. The heading of the part in that Report was 'Fundamental Principles of Governance', and Article 1 of the Report laid down that the

"principles of policy set forth in this part are intended for the guidance of the State, while these principles are not cognisable by any Court, they are nevertheless fundamental in the governance of the country and their application in the making of laws shall be the duty of the State".

Article 10 of the Report dealing with nutrition, contains no reference to the prohibition of the consumption of intoxicating drinks. In the Draft Constitution the present Article 37 was Article 29 and Article 47 was Article 38. The heading of the Report had been changed into the present heading, as also the phraseology of Article 1 of the Report so as to conform to the phraseology of present Article 37. The rider as to prohibition was added to Article 38 (in the draft) during the discussion of that Article by the Constituent Assembly.

Because these principles are not justiciable, the argument has been advanced that they can be disregarded with impunity by a Legislature in enacting laws. Whether this is the true position can only be answered with reference to the pronouncements of important members of the Drafting Committee in the Constituent

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Assembly during the discussion on Article 28 (present Article 36). Dr. Ambedkar pointed out that it was the intention of the Constituent Assembly that in future both the Legislature and the Executive should not merely pay lip service to these principles but that they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of the governance of the country. Mr. Alladi Krishnaswami Ayyar said on the 23rd November, 1949, in the Constituent Assembly :

" Having regard to the wide nature of the subjects dealt with in these articles and the obvious difficulty in making the subjects dealt with by these articles justiciable, they have been classed as directive principles of state policy. . . . . . No ministry responsible to the people can afford lightheartedly to ignore the provisions in Part IV of the Constitution."

The Supreme Court in *The State of Madras* v. *Champakam Dorairajan*[1] while concerned with the somewhat different though cognate question as to whether directive principles can override the provisions of Part III have remarked that so long as there is no infringement of fundamental rights there can be no objection to the State acting in accordance with the directive principles. This language is not capable of the interpretation that laws violating directive principles are invalid. In view of the above pronouncement of the highest tribunal the views of Somasundaram, J., in *Champakam Dorairajan* v. *The State of Madras*[2] and of Kapur and Falshaw, JJ., in *Om Parkash* v. *State*[3], that the articles in Part III must be read with the directive principles, assume a subsidiary and academic importance. Viswanatha Sastri, J. in *Champakam Dorairajan* v. *The State of Madras*[2], opines that discrimination which is prohibited by Part III cannot be admitted by the backdoor of Part IV. The absence of an article similar to Article 13 (which invalidates laws violating Part III) in Part IV, and the language of Article 37 with its reference to the ' duty ' and not ' obligation' of the State to make laws consistent with Part IV, militate against the invalidation of laws offending Part IV. But the question arises, if Part IV made no difference to the validity of laws encted in defiance of the principles contained therein, what was the object in enacting Part IV ? This is a somewhat difficult question to answer and one can only guess the intention of the Drafting Committee in putting Part IV from the circumstances under which the Constitution was framed. Having regard to entry 8 of List II (intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors), entry 19 of list III (drugs and poisons), entry 51 list II (duties of excise on alcoholic liquors for human consumption manufactured in the State) and Article 246 dealing with the subject-matter of laws made by Parliament and State Legislatures, the validity of liquor excise legislation would appear to be beyond doubt. Having regard to Article 372 which deals with continuance of existing laws it would appear that repeal of prohibition laws could be brought about by the competent Legislature contemplated by that Article. But as pointed out above, the crucial question still remains to be answered, what purpose does Part IV serve if it is nothing more than a charter of pious platitudes, or a leaf torn from a tome enshrining political manifestos ? To answer this question one must go to the very foundations on which our constitutional edifice has been reared and a reference to the Constitution of the United States of America thus becomes inevitable. The American Constitution is based on judicial supremacy, judicial veto, due process, and such cognate doctrines. Our Constitution has plumped for Parliamentary Supremacy and has no particular liking for American due process. The process of jettisoning American due process began with the enactment of Article 21 and culminated with *A. K. Gopalan* v. *The State of Madras*[4] where the Supreme Court was averse to converting itself into a third chamber of the Legislature. In my opinion, Part IV was intended by the Drafting Committee to be some sort of compensation for the omission of, and a substitute for, due process. While our Supreme Court was under the terms of our Constitution debarred from importing into the interpretation of the Constitution some fundamental principles which were

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1. 1951 S.C.J. 313 : (1951) 1 M.L.J. 621 (S.C.).
2. (1950) 2 M.L.J. 404 (F.B.).
3. A.I.R. (1951) Punj. 93.
4. (1950) S.C.J. 174 : 1950 S.C.R. 88 : (1950) 2 M.L.J. 42 (S.C.).

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above all laws the Drafting Committee was loath to conferment of judicial blessings on each and every law whose only merit was that it conformed to the Seventh Schedule. The principles of Part IV were to be pressed into aid in interpreting the Seventh Schedule and other portions of the Constitution and after paying due regard to administrative and financial considerations, balance of convenience, etc., laws not fitting into Part IV could be invalidated. That appears to me to be the meaning of the expressions 'strive' (which occurs six times), 'take steps', 'promote with special care' etc., occurring in Part IV. Part IV therefore represents not the rigid, inexorable and merciless American due process under whose lash the law-making body cowers, but a kindly, flexible and discretionary due process which invalidates laws only when there is no other way out. Part IV is not the blue-print of any particular political party but enshrines a mixed political ideology which might aspire to some hopes of permanence notwithstanding violent fluctuations due to changes of party politics, and aims at continuity of legislation and legislative policies in spite of change of Governments and of the political complexions of Legislatures.

It is not just therefore to describe Part IV as containing New Year resolutions (as it was described by Mr. Naziruddin Ahmed in the Constituent Assembly), or as being in the nature of a cheque on a bank payable when able, that is only if the resources of the bank permitted, which was the analogy suggested by Professor K.T. Shah. Part IV is intended to keep Legislatures on the right track without at the same time embarrassing them with tall and impracticable orders. The Courts are by the language (careful and well chosen and cautious) used in Part IV constituted the arbiters to decide the time, manner and pace of the wholesome objectives placed by the Constitution before the Legislature.

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REVIVAL OF THE WIDOW'S POWER OF ADOPTION UNDER HINDU LAW

BY

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Certain observations of Justice Saryanarayanarao in the case of *Aravamudha Ayyangar* v. *Ramaswami Bhattar*[1], have been pointed out as being in conflict with the decision of the Privy Council in the case of *Amarendramansing* v. *Sanatansing*[2]. But the observations of the learned Judge of the Madras High Court are more in accordance with the genius of Hindu Law than the pronouncement of the Privy Council in *Amarendra's case*[2]. Justice Satyanarayanarao observed :

> " The full legal capacity to continue the line means continuance of the line in one of two ways, *i.e.*, either by leaving a natural or adopted son or a widow capable of bringing into existence a son by adoption. The test is to find out whether these conditions existed at the time of the son's death. If they did not exist the power did not terminate. If they existed the power came to an end and in certain circumstances, *e.g.*, if the son's widow dies without making an adoption, the mother's power may be revived. If the object of adoption is the religious one of perpetuating the line with a view to make a permanent arrangement for the administration of the spiritual wants of the deceased, the object is not acheived when the continuance of the line came to a standstill. There must be some power somewhere to continue the line, and if the person lower down dies without providing for the continuance of the line, the power of the person higher up revives and continues."

It is said that this theory of revival of power does not receive any countenance from the observations of the Privy Council in *Amarendra's case*[2]. But it is reiterated that this theory is in accordance with the genius of Hindu Law. It was held in *Amarendra's case*[2] that the power of adoption would be extinguished on the son's death by the survival of either a grandson or the son's widow. It is argued that since the power is extinguished it can never be revived. But it may pertinently be asked whether the power is actually extinguished or only suspended. There is no text of Hindu Law which says that the power is extinguished and certain decisions of the Nagpur and Lucknow High Courts[3] support the theory of revival. When

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1. (1952) 1 M.L.J. 251.
2. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
3. *Bapuji Ramji* v. *Gangaram*, I.L.R. (1941) Nag. 178, *Prem Jagat Kuer* v. *Harihar Bakshising*, I.L.R. (1946) Luck. 1.

the son and his widow passed away without providing for the continuance of the line, the duty of providing for the continuance of the line by adoption is cast upon the mother. The mother's right of adoption is only suspended in the meantime and not extinguished. Moreover there is distress (*apat*) here in the form of the extinction of the family. Once the obstacle to the exercise of her right is removed the mother can adopt.

Sri K. R. Ramaswami Ayyangar in his essay—" Posthumous Adoption"—published in 1949 (2) M.L.J. at page 55 writes thus—

> " Since the power of the widow exhausts only when there is an adoption and that person beget a son or leaves a widow competent in the way of law to beget a child by adoption it may be necessary that this limitation should be there not only for the first time she adopts but during each time she has power to exercise the authority, the period of limitation starting from the date of revival of the power of the widow to adopt."

These observations presume the possibility of revival.

The power of the mother is never extinguished but only kept in abeyance by the presence of counter-circumstances. Moreover the son and his widow being dead there is no reason why the mother-widow should not adopt with the consent of the sapindas, because the son adopted by her is equally efficient in conferring spiritual benefit on ancestors as a son adopted by the son's widow. In this way the religious purpose of adoption also would be served. To take an example from the *Purvamimamsa*—when the *somalata* is not available *putika* can be substituted in its place. So also when the person primarily entitled to adopt is not available, the next rightful person may adopt. Such person's right is only kept in abeyance by the existence of the holder of a superior title but is not extinguished. As long as there is the daughter-in-law of course she would be primarily entitled to adopt. But when she is not in existence why should not the mother-widow be allowed to adopt with the consent of the sapindas? Nandapandita in his *Dattakamimamsa* authorises a person, whose son is dead, to adopt. When the son and daughter-in-law have died without providing for the continuance of the line, the mother is left in the category contemplated by Nandapandita. Hence she is entitled to adopt. Thus the general principles of the law of adoption also support the theory of revival.

In *Amarendra's case*[1] itself the Privy Council warned

> " that great caution should be observed in shutting the door upon any authorised adoption by the widow of a sonless man ".

The widowed mother-in-law, bereft of her son and daughter-in-law, both of whom died without providing for the continuance of the line, is left precisely in the same position as is contemplated by the Privy Council.

The genius and spirit of Hindu Law of adoption is best expressed by Manu in the following verses :. The spiritual efficacy of a son is thus described :

क्षेत्रजादीन् सुतानेतानेकादशयथोदितान् ।
पुत्रप्रतिनिधीनाहुः क्रियालोपान्मनीषिणः ॥ (ch. 9. v. 180)

पुंनाम्नो नरकाद्यस्मात्त्रायते पितरं सुतः ।
तस्मात् पुत्रः इति प्रोक्तः स्वयमेवस्वयंभुवा ॥ (ch. 9. v. 138)

पुत्रेण लोकान् जयति पौत्रेणानन्त्यमश्नुते ।
अथ पुत्रस्य पौत्रेण ब्रध्नस्याप्नोति विष्टपम् ॥ (ch. 9. v. 137)

यस्मिन्नृणं संनयति येन चानंत्यमश्नुते ।
स एव धर्मजः पुत्रः कामजानितरान् विदुः ॥ (ch. 9. v. 107)

1. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 ; I.L.R. 12 Pat. 642 (P.C.).

In the case of the widowed mother, whose son and daughter-in-law died without leaving a son and without adopting, the essential condition of adoption, namely, the absence of a son who can confer spiritual benefit and perpetuate the lineage, is present. Hence it is but proper that she should adopt.

Even the great poet Kalidasa voices the spiritual efficacy of a son in his Raghuvamsa and Sakuntala thus :

नूनं मत्तः परं वंश्याः पिण्डविच्छेददर्शिनः ।
न प्रकामभुजश्राद्धे स्वधासंग्रहतत्पराः ॥ Raghuvamsa (1—66)
मत्परं दुर्लभं मत्वा नूनमावर्जितं मया ।
पयः पूर्वैः सनिश्वासैः कवोष्णमुपभुज्यते ॥ Raghuvamsa (1—67)

राजा—अहो ! दुष्यंतस्य संशयमारूढाः पिण्डभाजः ॥
अस्मात्परं बत यथाश्रुतिसंभृतानि
को नः कुले निवपनानि करिष्यतीति ।
नूनं प्रसूतिविकलेन मया प्रसिक्तम्
धौताश्रुशेषमुदकं पितरः पिबन्ति ॥ (Act 6—v 25 Sakuntala)

In the Bengal case of *Manikchand* v. *Jagatsettaini*[1] it was held that if the estate is once more vested in the mother, after the death of the son and his widow without issue, or adoption, her right of adoption revives. According to the custom obtaining among the Nattukottai Chetties of Madras the power to adopt does not come to an end, where the son has died leaving a widow. (*Subramaniam v. Somasundaram*[2]. So the custom and consciousness of the community also support the theory of revival.

The argument in *Amrendra's case*[3] that the father's duty or debt is discharged the moment the burden of continuing the line and solemnizing the rites is passed on to a new generation does not appear to be convincing. Because in such a case Nandapandita's dictum that one whose son is dead, may adopt, becomes meaningless. To say the least, such a father whose burden is passed on to a new generation may be delivered from the hell called *Put*, because he has seen the face of his son. But if such son and his widow die issueless and without adoption, are the other aims of adoption namely, the offering of the funeral cake and water, and the celebrity of the name, and the perpetuation of the lineage, fulfilled? Hence the widowed mother can adopt with the consent of the sapindas. I may conclude that the observations of Justice Satyanarayanarao faithfully reflect the true spirit of the Hindu Law of Adoption.

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1. I.L.R. (1889) 17 Cal. 518.
2. (1937) 1 M.L.J. 60 : I.L.R. (1936) 59 Mad. 1064.
3. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).

MADRAS BUILDINGS LEASE AND RENT CONTROL ACT (XXV OF 1949), SECTION 7—A NOTE ON THE DEFAULT CLAUSE.

BY

V. SREE RAMA MOHANA RAO, B.A., B.L., *Advocate, Bapatla.*

Section 7 (2) (i) of the Madras Buildings Lease and Rent Control Act (XXV of 1949) states that a landlord may apply to the Rent Controller for eviction of his tenant on the ground that the latter has not paid or tendered the rent due by him within 15 days after the expiry of the time fixed in the agreement or in the absence of an agreement by the last day of the next month. When a petition is presented under section 7 (2) (i) for default of arrears of rent if the tenant shows that the default in question is not wilful (because that is the only plea available) the Rent Controller may give a reasonable time not exceeding 15 days to pay or tender the rent due up to the date of such payment or tender. This is proviso to section 7 (2) (i) which is added by the Amending Act VIII of 1951. This is an important innovation. If the default alleged is wilful eviction will be ordered against the tenant. The Act is exhaustive and self-contained. The provisions of the Civil Procedure Code have no application. *Abdul Kadir Hadjiar* v. *A. K. Murthi*[1]; *Devichand Mulchand* v. *Dhanraj Kantilal*[2]. There is a recent pronouncement of Ramaswami, J., on this point reported in *Fernandes* v. *Ranganayakulu Chetti*[3]. The term "wilful default" is not defined anywhere in the statute. Other Acts have to be looked into for ascertaining the meaning of the term wilful default. Under the 1946 Act there is no proviso to section 7 (2) (i).

Section 7-A is another novel provision which has a bearing on the matter. This applies not only to section 7 (2) (i) but equally to all grounds of eviction mentioned in section 7. It states that when a petition is presented under section 7 by the landlord, the tenant has no right to contest the application or to prefer any appeal unless he pays or deposits with the controller or the appelate authority all arrears of rent due up to the date of payment or deposit in respect of the building and continues to pay or deposit any rent which may subsequently become due. When the tenant pays or deposits all the arrears of rent the petition or appeal as the case may be has to be heard and disposed of on merits. If the controller finds that there is wilful default proviso to section 7 (2) (i) comes into play. On the other hand if he fails to pay or deposit the arrears of rent eviction follows under section 7-A (4) in the absence of sufficient cause. Section 7-A was held to be applicable to appeals also and the appellate Court has power to condone the default. *Aravamudhu Chettiar* v. *Abdul Khader Rowther*[4]. (Govinda Menon, J.)

When there is any dispute as to the quantum of rent to be paid or deposited the controller has power to determine the same summarily [section 7-A (3)]. If the arrears of rent are not deposited with the controller as directed by him and an appeal is preferred and when there is a dispute as to the amount of the rent it is doubtful whether the appellate authority can exercise the power under section 7-A (3) in view of the omission of the words " Appellate Authority " in section 7-A (3).

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1. (1947) 2 M.L.J. 482.
2. (1948) 1 M.L.J. 276.
3. (1952) 2 M.L.J. 445.
4. (1952) 2 M.L.J. 492.

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EQUALITY BEFORE THE LAW AND EQUAL PROTECTION OF THE LAWS*

By

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Mr. President and Brother-members of the Bar of India,

It is indeed a rare privilege and I count it as sacred to address my colleagues in the legal profession in this momentous, august and learned gathering on a subject that is pregnant with topical, legal and political importance, *viz.*, "Equality before the Law and Equal Protection of the Laws". In these days of conflicting rights, when rights and privileges are stressed more than duties and obligations, when the upward surge of new democratic forces particularly in young, immature, independent republics as India, tend to make the party in power and the executive feel more sacrosanct than even our courts of justice and the Constitution, it is betimes that in the very interests of the Freedom which we want to preserve at all costs, we must focus public attention on the supremacy of the Constitution to which the Executive, the Legislature and even the Judiciary are only subordinate and that as between the last three it is the Judiciary that must be deemed as interpreter of the Constitution and the resolver of conflicts when rights of the people, the Executive or the Legislature are in conflict *inter se*. The limitations which have to be always kept in view can be summed up in the three memorable golden rules propounded by Professor Berridale Keith:

(i) That the judicial decisions should be upon fixed principles already established;

(ii) Legislation must favour the limitation of executive and judicial power to deal arbitrarily with individual rights;

(iii) The Government should jealously respect its legal limitations.

It is wise to remember we are in a federal state and so we must appreciate the meaning of double allegiance to the State Laws and the Federal Laws. A federal people must exhibit a high sense of political education and legalism, *i.e.*, 'a general willingness to yield to the authority of law courts' which courts alone can decide what the Constitution at any given moment is. As Professor Dicey would put it:

> "A Federal System can flourish only among communities imbued with a legal spirit and trained to reverence the law, is as certain as can be any conclusion of political speculation. Federation substitutes litigation for legislation and none but a law-abiding people will be inclined to regard the decision of a Suit as equivalent to the enactment of a Law"

and the learned constitutional expert would add:

* A thesis read before the Eighth Madras State Lawyers' Conference at Salem on 30th December, 1952, under the presidency of the Hon'ble Mr. Justice T. L. Venkatarama Ayyar.

"The main reason why the United States of America has carried out the Federal System with equal success is that the people of the union are more thoroughly imbued with legal ideas than any other existing nation."

I have ventured to quote Professor Dicey in detail as there is a prevalent fashion even among the highly educated gentry who climbed up the ladder of political power in our country (not to speak of the Cromwells of lesser calibre) to decry the interpretative jurisdiction of Courts of Law and to hail their own conceptions of what is good for the country as pearls of wisdom. They would appear to desire that powers of Courts of Law must be eschewed for their own party ends forgetting the next party in power may do just the contrary. It is well to again quote Dicey:

"yet any nation who cannot acquiesce in the finality of even possibly mistaken judgment is hardly fit to form part of a federal state."

It is, therefore, wise for politicians as well as the laymen in India to realise that respect for the Constitution, for the law of the land, for the rule of law and for courts of justice are the pivots on which our Indian Federation could march forward in the field of successful Federalism. Unless we, the people, exhibit to the fullest, traits of federation and legalism we cannot dream of an unalloyed federal constitution divested of even the few unitary tendencies that may be present in the Indian Constitution as it is to-day.

Gentlemen, my esteemed friend, Mr. M. K. Nambiar, Bar-at-Law, addressed our last conference at Kozhikode on "Fundamental Rights." It is my turn now to particularly dilate on a special aspect of these fundamental rights, *viz.*, "Equality before Law and Equal Protection of the Laws". The Constitution of India presents in Part III, (Article 12 to 35) the Magna Carta of India. It vouchsafes to the citizens of India certain fundamental rights which are inviolable and are to be guaranteed to him by any governmental party in power. The tyrrany of the majority in representative party governments of latter days had necessitated such constitutional guarantees as a permanent safeguard to minorities. This charter of liberty is a sheet-anchor for all young democracies. Lest authority should corrupt, constitutional limitations are made the safety-valves for the essential well-being and happiness of free citizens. In England, Parliament is supreme. Tradition, conservative outlook, representative and responsible cabinet system and a supreme Parliament form the real guarantee to the people of England of the inherent rights, of liberty of the individual, liberty of speech, liberty of association and equality in the eyes of law. Professor Dicey would assert that in England:

"The right to individual freedom was part of the Constitution (unwritten) because it is inherent in the ordinary law of the land; the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation."

Individual liberty in England and equality before law can be secured by resort to 'writs' or 'remedies' in courts of law. But the Parliament is so supreme that it can alter statutory or judge-made law. Magna Carta and the Bill of Rights merely declared the existing common law and bound only the executive and never the Parliament. By contrast we find in the American Constitution a recognition of Montesquieu's famous doctrine of 'separation of powers.' The visible element of this 'separation' is complete independence of the American judiciary which is supreme and as Dicey states it 'the judiciary in a Federal State is sometimes the master of the Constitution.' While the Congress is subordinate to the Constitution, it is the domain of the Supreme Court to interpret the Constitution. The Indian Constitution is a happy compromise between the supremacy of the Parliament and supremacy of the judiciary. In India, the Constitution is supreme, holding in subordination, the three powers, the executive, the legislature and the judiciary though the latter are given the unique privilege to resolve all conflicts and interpret the Constitution.

Equality before Law.

The two significant terms of constitutional importance in this thesis are 'Equality before Law' and 'Equal protection of the Laws.' The former is of English origin while the latter has been taken out of the American Constitution. The two

terms are not really identical. The 'Rule of Law' coined by Professor Dicey carried with it the concept of 'Equality before the Law'. In other words, in England 'No man was above the Law.' Whatever his rank or condition may be, he is subject to the ordinary law of the land and jurisdiction of the ordinary courts. The supremacy of the law implied the exclusion of arbitrary power and the equality of all citizens before the ordinary law of the land.

Equal Protection of the Laws.

The term 'Equal Protection of the Laws' is, however, a positive concept. It is imbedded in section 1 of the 14th Amendment of the Constitution of America. The 13th Amendment of 1787 abolished slavery in any form in the United States of America. But the most significant amendment, however, was the 14th passed by the Congress in 1868 by which all citizens of the United States of America (inclusive of the erstwhile slaves) cannot be deprived of life, liberty or property without 'due process of law' nor can any State deny to anyone 'Equal Protection of Laws' and it was particularly enjoined that 'no State shall abridge the privileges or immunities of the citizens of the United States of America.' The Constitution of Eire (Ireland) guaranteed under section 40 (1) that 'all citizens shall, as human persons, be held equal before law'. We have in section 13 of the Constitution of Burma the significant provision that 'all citizens irrespective of birth, religion, sex or race, are equal before the law, that is to say, there shall not be any arbitrary discrimination between one citizen or class of citizens and another.'

Profiting by experience of other federal countries we have inserted in the Indian Constitution Article 14 which enunciates that the State shall not deny to any person equality before the law or the equal protection of the laws within the 'territory of India'. The emphasis must be on the three words 'State', 'any person' and 'territory of India' to reveal that, that (i) the guarantee is only by the State and not by private citizens, (ii) the guarantee extends to any person not necessarily a citizen of India but any one (inclusive of foreigners) present in India, (iii) the guarantee extends throughout the territory of India.

Sir Ivor Jennings has expressed that

"Equality before the Law means that among equals the law should be equal and should be equally administered, that like should be treated alike . . . . The right to sue and to be sued, or to prosecute and be prosecuted, for the same kind of action should be the same for all citizens of full age and understanding and without distinction of race, religion, wealth, social status or political influence."

Dicey would explain that the term 'Rule of Law' meant 'the supremacy of the predominance of law as distinguished from mere arbitrariness.' This equality before law is not absolute but is subordinate (as succinctly laid in the Constitution of Eire) to differences of capacity, physical, moral and social functions. Any wrongful act or breach of the law will be dealt with in similar manner whether the offender is a peasant, public officer or a man of high social position. Maybe, each in his own sphere, may wield large powers but in the eye of law they are all one. Certain privileges and immunities are, however, offered in all Constitutions to heads of States, foreign sovereigns, ambassadors, foreign ministers, etc., but these should not be understood as undermining the doctrine of Equality before Law. In our own Constitution Article 361 provides for exceptional treatment to executive heads of the Union and the States, public officials, etc. Parliament has the power under Article 246 to legislate in respect of foreign ambassadors (Entry 11 of List I, VII Schedule) and of aliens. (Entry 17 of List I).

Equal Access to Courts.

We may state that equality before law connotes equal justice to all. Right of equal access to courts is a natural corollary to the equal protection clause and this was particularly stressed in an American case *Barbier* v. *Connolly*[1], where the doctrine of equal protection was elaborated this-wise

"That no impediment should be interposed to the pursuits of any one except as applied to the same pursuits of any one or others under like circumstances; that no greater burden should be laid upon one than are laid upon others in the same calling and condition. . . . . . that in the administration of criminal justice no different or higher punishment should be imposed upon one than such

1. (1885) 113 U.S. 27.

as is prescribed to all for like offence . . . . All persons should have like access to courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contract."

This cardinal principle of equal access to court was put to test in India soon after the Constitution came into force in *Mahbub Begum and others* v. *Hyderabad State and others*[1]. In this instance the Begum and her children who had been declared to be heirs of the deceased Nawab Wali-ud-Daula Bahadur by a Special Court was sought to be deprived of that right by a sort of police action on the part of the Hyderabad State. The Nizam, the Rajpramukh, the then repository of legislative power enacted a special Act termed The Hyderabad Wali-ud-daula Succession (Decision of Disputes) Act XVI of 1950. By section 2 of the Act the claims of the Begum and her children secured by the decree were dismissed and section 3 barred any reference to this decision by Statute in any Court of Law. This was extraordinary and against all canons of natural justice. The Full Bench upheld the principles enunciated in *Barbier* v. *Connolly*[2] advocating equal access to court and equal protection, and further laid down that sovereign discretionary powers should not be abused by an arbitrary invasion of substantial rights secured to the citizens by offensive exactions and discriminations ; that the right to institute a suit in a court of law is a civil right which cannot be taken away by statute ; that it would amount to denial of equal protection of the laws to the Begum under Article 14 and the deprivation of property rights would further offend Articles 31 and 19 (*f*) of the Constitution. The Act XVI of 1950 though a State-made law was not a valid law and was therefore void under Article 13 (2).*

Equal Legal Aid.

Equal availability of the legal aid is another fundamental criterion to bring about true equality in the eye of law. It was in this sense that in England that necessity arose for passing the Legal Aid and Advice Act of 1949. Some such aids to the poor litigant by statute is necessary in India if the fundamental guarantee of equality before the law is fully to be realized by the poorest of citizens. In other words, law must be within the easy reach of all to enjoy the fruits thereof. By its very costliness or cumbersome procedure the poor or the ignorant should not be denied the opportunity to reap the benefits of equality before the law. In this connection I would commend an article on ' Legal Aid as Community Service ' penned for the magazine section of *The Indian Express* of 16th November, 1952, by our colleague at the Bar, Mr. K. V. Gopala Menon. We may emulate America in this by forming of legal aid societies all over our country. Assignment of counsel on paid or honorary basis to litigants in civil or criminal cases is beautifully organized on voluntary as also on statutory basis in America. We have statutory aid in India only in cases of murder. But our civil and criminal procedure must be so amended as to furnish legal aid in all civil and criminal cases whenever the court is of the opinion that the party is too poor to engage counsel. A special statute whereby legal aid societies can be formed and who could be compelled to aid courts of law in the aforesaid cases, is a natural culmination for the success of the doctrine of equal protection and equality before law.

Due Process of Law.

The American Constitution by the 5th Amendment directs the Federal Government to ensure " Due Process of Law." The application of this ' Due Process ' clause brings within its ambit the guarantee of equal protection of laws. The 5th Amendment specifically sets out that

" no person shall be subject for the same offence to be twice put in jeopardy of life or limb ; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law ; nor shall private property be taken for public use without just compensation."

In our Indian Constitution Article 31 guarantees compensation for acquisition while Article 21 ensures protection of life and personal liberty according

1. A.I.R. 1951 Hyd. 1 (F.B.). 2. (1885) 113 U.S. 27.

* *See* also on appeal to the Supreme Court : (1953) S.C.J. 61 (S.C.).

to procedure established by law. Article 20 gives protection against double prosecutions. But the words 'Due Process of Law' has been significantly omitted in our Constitution to avoid all confusion and doubt. The general law of the land assures safe remedies such as open trial, full hearing, right of cross-examination, right of being represented by counsel, appeal, etc. Due process means a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial according to forms of law appropriate to the case and just to the parties affected. Reasonable certainty is another requisite of due process. In England and America no one can be deprived of his life or liberty except for a clear breach of the law and without due process of law. But all that is provided in our Constitution is under Article 21, 'no person shall be deprived of his life or personal liberty except according to the procedure established by law.' Our Constitution does not secure due process of law. It secures only procedure established by law. In *A. K. Gopalan's Case*[1], the Supreme Court of India held that the words "Due Process of Law" were deliberate omissions in our Constitution and that American cases dealing with that principle cannot be held applicable to India that the word 'law' in Article 21 has been used in the sense of State-made or enacted law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice. 'Procedure established by law' therefore only connotes procedure prescribed by the law of the State. Due process of law, on the other hand, would take us into the doubtful mire of procedure sanctioned by settled usage or natural justice and therefore was purposefully omitted in our Constitution.

It is well to remember that in America the 'due process' clause was available to corporations as well as individuals, aliens as well as citizens of the United States of America. Article 14 of our Constitution can likewise be invoked by aliens in our country. In America the due process clause was a limitation on the Legislature as well as on the executive; secondly it related to substantive as well as procedural rights. If the police power of the State intervened due process, then the former must pass the test of reasonableness and should not be arbitrary, vide *Lochner* v. *New York*[2]. Due process includes natural justice, opportunity of a fair hearing, service of process, an impartial tribunal, *Turney* v. *Ohio*[3], absence of fraud, *Chicago, M. & St. P.R. Co.*, v. *Minisesota*[4], courts free from outside duress, *Frank* v. *Mangum*[5], etc. Denial of due process includes excessive penalties, *Missouri Pacific Ry. Co.* v. *Tucker*[6], un-uniform taxes, *McGowan* v. *Illinois Bank*[7], unequal administration of law by an official, *Snowden* v. *Hughes*[8], etc. Equal protection clause does not prohibit States from restricting the enjoyment of political privileges to certain classes of their citizens as they deem proper, vide *Blake* v. *McOlung*[9].

Equal Protection to Negroes.

Negroes in America earned their emancipation by the 13th Amendment to the Constitution of the United States of America which postulated that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States of America or any place subject to their jurisdiction. The 14th Amendment further enjoined all persons born or naturalized in the United States of America and subject to the jurisdiction thereof are citizens of the United States of America and of the State wherein they reside. It further guaranteed all privileges and immunities, equal protection of laws and due process of law. The Negro thus became a full-fledged American citizen. In the leading case *Norris* v. *Alabama*[10], Chief Justice Hughes reversed the conviction for rape, of nine negro boys on the ground that defendants had been denied due process of law such as disqualifying of nine competent negro jurors, on the ground of race. In the field of education in *Gaines, A negro citizen of Missouri*

1. (1950) 2 M.L.J. 42: (1950) S.C.R. 88; (1950) S.C.J. 174 (S.C.).
2. 198 U.S. 45.
3. (1927) 273 U.S. 510.
4. 134 U.S. 418.
5. 237 U.S. 309.
6. 230 U.S. 340.
7. (1898) 170 U.S. 283.
8. (1943) 321 U.S. 1.
9. 172 U.S. 239.
10. 294 U.S. 587.

v. *University of Missouri*[1] an action brought for not admitting the negro in its law school, the same Judge Hughes opined:

"The petitioner's right here is a personal one, it was as an individual that he was entitled to the equal protection of laws and the State was bound to furnish him within its borders facilities for legal education substantially equal to that which the State offered for persons of the white race, whether or not other negroes sought the same opportunity."

But, however, American conscience was really not initially frank. In *Plessey* v. *Fergusson*[2] a subtle distinction was made that 'equal but separate' treatment of the two races would satisfy the 14th Amendment. The statute which allows rail-roads in Louisiana to provide equal but separate accommodations for white and coloured races was sustained. This halting doctrine came to an acid test in the case of *Sweat* v. *Painter*[3] which turned down the separate treatment practice and held the negro student was entitled to his full constitutional rights of the same legal education without any racial segregation. It is appropriate to mention here that though the Constitution of Federal America came into being in 1787, it took so late as 1865 and 1868 to usher in the 13th and 14th Amendments so as to give equality of treatment to negroes. Much of this however, was only on paper and only in 1950 by judicial interpretation in *Sweat* v. *Painter*[3] has the negro got out of the ring of racial segregation. In India, gaining by the American experience Article 14 has vouchsafed to all resident in India the equal protection clause, while Article 17 abolishes 'untouchability' in all forms. But it is regrettable that while even conservative India is far ahead of other countries in the matter of treatment of aliens and prohibits segregation in any form, in any section of its nationals, it is a tragedy that South Africa, which is said to be advanced in western civilisation should resort to primitive doctrines of racial discrimination and segregation. Its Apartheid Policy is fast becoming the ground for probably another Global War. It is betimes that saner counsels do prevail in the African continent so as to re-establish the divine theory of oneness of humanity and universal brotherhood which is the pivot over which any civilized government can function.

Even early periods of American negro distress appear to pale before the cruelties effected on this new-fangled apartheid policy of Africa. Police-torture with a view to forcing out confessions particularly from negroes charged with breach of the law was a blot on American civilization. In *Chambers* v. *Florida*[4] such tortures were deprecated as tyrranical, unjust and illegal and against due process of law. The negroes were set at liberty and the convicting judgment of the Supreme Court of Florida was reversed. In *Brown* v. *Mississippi*[5], it was pithily stated:

"To permit human lives to be forfeited upon confessions thus obtained (by torture) would make the constitutional requirement of due process of law a meaningless symbol."

The trite saying that justice must not only be done but seem to be done according to form rests on this principle of 'Due Process of Law.' In *Turney* v. *Ohio*[6], Taft, C.J., observed that:

"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter 'Due Process of Law'."

Onus of Proof and Duty of Courts.

The onus of proof in cases where the equal protection clause is alleged to have been violated is upon the person who assails the law, *vide*, *Lindsey* v. *National Carbonic Acid Gas Co.*[7] The function of Courts in the sphere of constitutional interpretation is aptly brought out by Sutherland, J. in *Atkins* v. *Childrens Hospital*[8] when he stated:

"The duty of Courts to hold an enactment either void or *ultra vires* is one of great gravity and delicacy and this power of Courts is subject to the guiding principles of decision which ought never to be absent from judicial consciousness; one is that Courts are concerned only with the Legislature's power to enact statutes and not with their wisdom; the other is that while unconstitutional exercise of power by the executive and legislative branches of Government is subject to judicial restraint the only restraint upon the exercise of power by Courts is their own self-restraint."

1. 305 U.S. 337 (351).
2. (1896) 163 U.S. 537.
3. (1950) 339 U.S. 629.
4. (1940) 309 U.S. 227.
5. 297 U.S. 278.
6. (1927) 273 U.S. 510.
7. (1911) 220 U.S. 61.
8. 265 U.S. 535.

The presumption is generally in favour of the constitutionality of an Act. As laid down in *Ogden* v. *Saunder*[1],

"It is but a decent respect due to the wisdom, the integrity and patriotism of the legislative body by which any law is passed to presume in favour of its validity until its violation of the Constitution is proved beyond all reasonable doubt."

Cooley limited the legislative power in these words:

"Legislatures have their authority measured by the Constitution. They are chosen to do what it permits and nothing more."

In *State of Madras* v. *V. G. Row*[2], Patanjali Sastri as Chief Justice of the Supreme Court described the difficult role of courts of law on India, under Article 13, thus:

"What is sometimes overlooked is that our Constitution contains express provision for judicial review of legislation as to its conformity with the Constitution unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative Acts under cover of the widely interpreted 'Due Process clause' in the 5th and 14th Amendments; if then the Courts in this country face up to such important and none-too-easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards 'The Fundamental rights,' as to which this Court has been assigned the role of a sentinel on the '*quivive*.' While the Court naturally attaches great weight to legislative judgment it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because *it appears to have been suggested in some quarters* that the Courts in the new set-up are out to seek clashes with the legislatures in the country."

In *Sunil Kumar Bose and others* v. *The Chief Secretary of the Goverment of West Bengal*[3] while striking down as *ultra vires* the Constitution the Bengal Preventive Detention Order of 1950 (issued by the President of the Republic) on its application to Bengal Criminal Law Amendment Act of 1930 and West Bengal Security Ordinance, 1949, which later two Acts were void under Article 13 (1), their Lordships of the Calcutta High Court summed up in forcible language:

"The Parliament of India is not supreme in the sense in which the Parliament of England is Our Parliament is subject to the Constitution,"

and discussing that there can be no delegation of legislative power of the President to the Courts their Lordships added:

"The effect of the order of the President is that the judiciary is converted into a legislature with limited powers and the executive is converted into a judiciary whose decisions are final. . . . . We also (the Judges) swore to uphold the Constitution and the laws. In our opinion we would be false to our oath if we give effect to this Adaptation of Laws Order, 1950, even though this Order may have emanated from the President of the Indian Republic. It has always been the tradition of this Court to stand between the subject and any encroachment of his liberty by the executive or any of the authorities however high. Amidst the strident clamours of political strife and the tumult of the clash of conflicting classes, we must remain impartial. This Court is no respecter of persons and its endeavour must be to ensure that above this clamour and tumult the strong calm *voice of justice shall always be heard. Fiat justitia ruat coelum.*"

Gentlemen, these are golden words. That is our ideal, to speak out boldly, truly and justly. Politicians and men in power may be erratic in their views, expressions and decisions. But courts of justice are there to protect the citizen from all such eccentricities and illegalities. Men in power, therefore, naturally would aspire to whittle down powers of courts of law so that they may give vent to their autocratic trends. But we of the legal profession, as guardians of the public and the general mass of citizens, must be alert and fight against any such curtailment of the powers of courts of law.

Fundamentals of Equal Protection.

We may now examine some of the fundamentals of the Equal Protection Clause. Justice Field stated in what is called *The Slaughter house cases*[4]

"That only is a free Government in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal and impartial laws."

Mr. Justice Packham in *Lochner* v. *New York*[5] stated

"No state can deprive any person of life, liberty or property except by due process of law."

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1. 12 Wheat. 213 at 270.
2. (1952) 2 M.L.J. 135: 1952 S.C.R. 597: (1952) S.C.J. 253 on appeal from (1951) 1 M. L.J. 628 (F.B.).
3. A.I.R. 1950 Cal. 274.
4. 16 Wat. 36.
5. 198 U.S. 45.

Thus monopoly in slaughter-house trade was struck down in the former case while in the latter the court struck down the statute limiting employment in bakeries to 60 hours per week and 10 hours per day as "meddlesome interferences with the rights of individuals to work as long and as hard as they liked." But in *Muller* v. *Oregeon*[1] the ten-hour day for women labour was sustained as a very reasonable restriction taking into consideration 'women's physical structure and the performance of maternal functions.' 'Due Process of Law' implies reasonableness of the measure and so the Minimum Wage Law was sustained as reasonable in *Settler* v. *O'Hara*[2]. In *Barbier* v. *Connolly*[3] the discretionary autocratic powers of the supervisor in the licensing rules was struck down as it was discovered there was horrid discrimination in that not one of the 200 chinese applicants was given the permit while the 320 laundries which were permitted had only wooden buildings contrary to rules and that only one of the white applicants was denied license. Justice Mathews forcibly put it:

"The very idea that one man may be compelled to hold his life or the means of living or any material right essential to the enjoyment of life at the mere will of another, seems intolerable in any country where freedom prevails."

Then follows this classic observation from his Lordship:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority *with an evil eye* and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In *Yick Wo* v. *Hopkins*[4] the same view was expressed thus:

"A denial of equal protection may lurk in the practical administration of a statute even if not required by its words."

In other words, the procedure by which Government is administered must in every instance meet the laws standard of what is rational, legal, just and appropriate. Reasonable certainty is another requisite of due process. To victimise a person as belonging to an unlawful 'gang' when the word 'gang' is not properly defined, is repugnant to the due process clause as being vague, indefinite and uncertain. In the sterilization cases *Skinner* v. *Oklahama*[5], the statute which decreed that habitual criminals should be sterilized so that felony may be eradicated by preventing any offspring to the felons, was questioned as unconstitutional. Considering it curious that offences against prohibition laws, revenue laws, embezzlement or political offences were considered as not involving heritable moral turpitude as felony, their Lordships held

"the classification of habitual criminals as too loose for so serious a business. Those who stole were sterilized. Those who embezzled were untouched . . . . . The power to sterilize further led to devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group (in power) to wither and disappear. There is no redemption for the individual whom the law touches. . . . . This is in violation of the constitutional guarantee of just and euqal laws. *The guarantee of equal protection of the laws is a pledge of the protection of equal laws*", vide, *Yick Wo* v. *Hopkins*[4].

But the State in its exercise of the police power can, however, curtail the rights of citizens in a limited sphere for purpose of the welfare of the commonweal in matters such as safety, morals, health, economic welfare and general prosperity of the community—vide *Mackay Jewellers* v. *Bowron*[6]. But this police power must be strictly limited to the actual requirements of an advancing complex society. All safeguards must be taken in this regard so as not to invade any fundamental right guaranteed to the citizen.

The State also can make *class legislation*, only it must be reasonable classification. In *Barbier* v. *Connolly*[3], their Lordships said:

"Special burdens are often necessary for special benefits such as for supplying water, preventing fires, lighting districts, cleansing streets, opening parks and many other objects. Regulations for the purpose may press with more or less weight upon one than upon another but they are designed not to impose unequal or unnecessary restrictions upon anyone but to promote with as little inconvenience as possible, the general good."

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1. 208 U.S. 412.
2. 243 U.S. 629.
3. (1885) 113 U.S. 27.
4. 118 U.S. 356.
5. (1942) 316 U.S. 535.
6. 139 A.L.R. 1188.

Classification and statutes limiting the rights of a class for their own welfare is legal. In *Radice* v. *New York*[1], a statute was sustained which prohibited employment of women in restaurants after 10 P.M. Child labour can also be regulated. This is on the principle expounded by Frankfurter, J., in *Tigner* v. *Texas*[2] that

"The Constitution does not require things which are different in fact, or opinion, to be treated in law as though they were the same."

In the interests of public welfare, legislation may regulate certain interests such as women, infants, imbeciles, insurance companies, railways, banks, corporations, etc. But this demarcation of a class must be reasonable, not arbitrary or capricious and must be in the interests of general public welfare. Thus liquor which is injurious to health can be regulated by legislation, other drinks not injurious can be left alone. Night work may be prohibited in case of infants and women. Municipal sewage pumping and clearance may be prohibited from being in the heart of a residential locality as injurious to health. Further there can be no guarantee of same laws and same remedies to different areas of the State which may vary in its needs. Vide *Missouri* v. *Lewis*[3]. The problem of segregating residential houses in one place, model apartment houses in another, industries in the third, shops in the fourth, is a feature of modern town planning. Such 'zoning' cases cannot be questioned as discriminatory. In *Village of Euclid* v. *Ambler Realty Co.*[4], zoning was upheld on the ground that growing urban life must be regulated for which all private rights must be subordinated to public good. This exercise of police power of the State is specifically needed in the matter of urban areas though it may be out of place for village communities.

Equality in law implies equal protection in *taxing laws*. This does not imply that each must be taxed equally but only connotes that persons of the same class or category placed in similar circumstances should be taxed equally by one standard; vide *Magoun* v. *Illion's Bank*[5]. The scale of taxation for the learned professions, trades, income from agricultural property, cinema and theatrical performances, etc., is regulated with different standards appropriate to each. Charitable institutions, public libraries charity shows—these may be exempt from taxation. But if the administration of tax laws results in intentional and systematic discrimination, it will be offending the doctrine of equal protection—vide *Bohler* v. *Callaway*[6].

Equal protection which is available in the legislative field is open also in the field of *execution or administration of laws*. In *Yicko* v. *Hopkins*[7] Justice Mathews declared

"It seems intolerable that a man should hold any public right at the pleasure of another. The guarantee of equal protection of laws is a pledge of the protection of equal laws."

Equal protection includes *equal access* to courts—vide *Barbier* v. *Canolly*[8]. But it does not mean same laws, or same remedies in all courts but only equal laws for a set of persons similarly placed in Tribunals of one particular caregory. There may be special courts for particular emergencies but the procedure and form of trial shall be based on the principle of freedom, liberty, natural justice. In India the procedure must be one prescribed by law. Per Article 14 of the Constitution of India the protection is only against State action and not of private individuals. In the latter event the ordinary law of the country must be resorted to for redress only when there is an actionable wrong suffered or committed.

Delegated Legislation and Administrative Tribunals.

The complexity of modern life, social and economic problems have necessitated the administration of certain aspects of law to departments of law which have created Tribunals to decide administrative and quasi-judicial issues. Dicey's vision of the Rule of Law, the supremacy of parliamentary legislation and the majesty or law courts, must have had a rude shock at the growth of these delegated bodies.

1. 264 U.S. 292.
2. (1940) 310 U.S. 141.
3. (1879) 101 U.S. 22.
4. (1926) 272 U.S. 365.
5. (1898) 170 U.S. 283.
6. 267 U.S. 479.
7. (1886) 118 U.S. 356.
8. (1885) 113 U.S. 923.

Dicey knew only of the administrative bodies (separate courts) in France called Droit Administration which determined the position and liabilities of all officials of the State, the civil rights and liabilities as between citizen and State by a special procedure. Dicey never foresaw that Tribunals and delegated legislation will be the order of the day all over the modern world. There is, however, a danger, inherent in this craze for tribunals if it is not properly regulated and manned. To remit the maintenance of constitutional right to the region of judicial discretion was felt as shifting the foundations of freedom from the rock to the sand—vide *Local Government Board* v. *Arlidge*[1]. When that is so, how much worse would it be when it is all relegated to the discretion of arbitrariness subject to no judicial appeal or review. This would tend to a denial of equal protection of laws. Lord Hewart's scathing and classical work on 'The New Despotism' throws a flood of criticism on delegated legislation and administrative Tribunals. I am in safe company when I venture to quote our distinguished president of this conference Sachivothama Doctor Sir C.P. Ramaswami Ayyar from his jubilee address delivered at the Madras Advocates Association on 16th April, 1949. He cited the Eastern Economist and said :

"Whereas in India of to-day the Legislature is really dominated by a single party and where the press is not yet functioning fully as the fourth estate of the realm, the executive must be kept in bounds until the opposition grows by a conscience of its own . . . . . . Authority has tended to give the executive a taste for Blanket powers which it is almost impossible to contest in a Court of law. The last of our defences, the judiciary is being rendered less effective by reason of the drafting of our laws and ordinances which makes it almost impossible for the actions of the executive to be questioned."

Sir Erskine May, author of the celebrated 'Parliamentary Practice', opined that

"as the national conception of Government has moved towards the regulation of the day-to-day affairs of the community, departmental legislation attracts fresh attention and members of parliament feel that the powers which they have delegated require organized scrutiny."

Democracy should ever have a vigilant and watchful eye on the abuses of such delegated authority and their devices of circumventing parliamentary and judicial correctives. In India after the new constitution the limits of delegated legislation has been clearly set out in *State* v. *Basdeo*[2], Desai, J., stated:

"When an authority makes rules in exercise of the powers conferred upon it by the Legislature, the Act is the real authority behind the rules and the Legislature retains control over the authority and the rules. So long as it retains control it cannot be said that it has delegated the power. The Constitution forbids delegation of legislative power. But it does not forbid delegation of rule-making which however must be subordinate to and within the ambit of the parent Act and such rule-making must only be intended to carry out and enforce the law enacted. If these principles are violated then section 13 of the Constitution renders all such laws void and *ultra vires*."

An administrative Tribunal is the judicial counterpart of the parliamentary rule-making powers delegated to subordinate bodies. To quote again Sir C.P. Ramaswami Ayyar's memorable and golden utterance:

"The wide range and variety of governments' penetration into daily life lead to such phenomena as are exemplified in the recent controversies regarding industrial Tribunals . . . . . such an approach makes for the growth of rule-making powers for the creation of new institutions not subject to jurisdiction of Courts . . . . . majority rule, unless the principle of '*Audi Alterum Partam* (Hear the other side) is not only remembered but implemented may become impatient of forms and ceremonies which may restrain or appear to delay its programme . . . . . leading to the error of what has been called 'Etatisme,' the vesting of absolute and unchecked powers in authorities not subject to scrutiny or cross-examination"

and unless checked and regulated with all safeguards there will be the danger of totalitarianism ushering in a bureaucracy which will not be tender towards law, lawyers or sombre courts of justice. Mr. Justice P. Govinda Menon in our last conference at Kozhikode echoed the same sentiment in his learned opening address and deprecated the burdening of judicial functions to an administrator or administrative Tribunal out of all proportion to public need and very often to the detriment of public and private justice, with not even the facility of a judicial review. His Lordship added :

1. (1915) A.C. 120. 2. A.I.R. 1951 All. 44.

"The only silver lining in the cloudy sky is that the High Courts and the Supreme Court are now vested with wide powers under Articles 32 and 226 of the Constitution to give such directions and pass such orders (in the matter of these Tribunals) by issue of writs such as *certiorari*, prohibition, *mandamus*, etc."

Our learned Chief Justice P. V. Rajamannar, visualizing all these difficulties enunciated the following six safeguards for the effective working of administrative Tribunals : *Vide* Article in The Golden Jubilee number of the *Indian Review*, 1950.

1. As far as possible an attempt should be made to insist on separation of judicial and administrative functions of all these specialised bodies. Members of these Tribunals who have to discharge judicial functions should be chosen by an independent commission independent of the party in power. The choice should include the Lawyer and the Judge elements.

2. The hearing before these Tribunals should be open to the public and unless inexpedient there should be a right of hearing if it is so desired by the party.

3. Tribunals should be required to give reasons for their decisions.

4. There should be provision for a right of appeal in important matters to a superior administrative Tribunal.

5. The decisions of these Tribunals should be open to review by a Court of law though on very limited grounds such as complete lack of jurisdiction, bias, pecuniary interest and failure to observe the fundamental canons of 'natural justice' which term though vague will certainly act as a good safety valve.

6. Lawyers should not be debarred from appearing before such Tribunals. These rules may include such sound basic principles as (1) No one to be a Judge of his own case; (2) no party should go unheard; (3) the decision should be in good faith.

I have dilated a little on these administrative Tribunals as they are tending to be the order of the day and unless checked with the above safeguards, they will soon become the instruments of oppression and arbitrariness leading to a denial of justice and equal protection of laws.

The March of the Doctrine of Equality before Law and Equal Protection in India after the Constitution.

The Indian judiciary always ranked very high in the matter of erudition, impartiality and justice. This was so, before and after the British period of suzerainty in India. On the wake of our freedom and on the establishment of the Supreme Court of India, the bulwark of justice has been trebly strengthened and from 26th January, 1950, when our Constitution came into full force, we find our Courts upholding the rights guaranteed in our Magna Carta and generally guiding society along the lines modelled out by the provisions relating to the directive principles in our Constitution. It was in *Keshava Madhava Menon* v. *State of Bombay*[1], the Supreme Court first deduced that (i) inconsistent laws get rendered void by virtue of Article 13 (1) only from the commencement of the Constitution, the past and pending transactions on the date of the commencement of the Constitution remaining unaffected; (ii) only the repugnant provisions are rendered void and not the whole impugned Act subject to the principles of the doctrine of severability. In *Amintalal* v. *Government of Mysore*[2], the impugned Act authorised the executive to forbid all persons residing in a particular area from partaking in the manufacture of beedies, the object being to prevent agricultural labour being diverted from the 'Grow More Food Campaign.' It was held that while the Act was invalid with reference to women, children, the weak and the infirm who could not be employed for agricultural labour, the language of the Act covered restrictions both within and without the limits of constitutionally permissible legislative action [*Vide* Article 19 (6)], the whole Act was void and it cannot be severed at all.

1. (1951) S.C.R. 228 : 1951 S.C.J. 182.
2. A.I.R. 1951 Mys. 26.

Whether singling out one company for special statutory control is discriminatory was discussed in the leading case under Article 14 in the judgment of the Supreme Court in *Charanjit lal Chowdhury* v. *The Union of India and others*[1], where the majority Bench, Kania, C.J., Mukherjee and Fazl Ali, JJ., enunciated the following principles:

(i) the presumption is always in favour of the constitutionality of an enactment since it must be assumed that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.

(ii) This presumption may be rebutted in certain cases by showing that, on the face of the statute there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual class, and yet the law hits only a particular individual or class.

(iii) The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons often requiring separate treatment.

(iv) The principle does not take away from the State the power of classifying persons for legitimate purposes.

(v) Every classification in some degree is likely to produce some inequality and mere production of inequality is not enough.

(6) If a law deals equally with members of a well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

(7) While reasonable classification is permissible such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained and the classification cannot be made arbitrarily and without any substantial basis.

The above has been summarised in a later case of the Supreme Court *State of Bombay* v. *Balsara*[2]. There is however one rational criticism that can be offered on one of the above propositions namely, that the selection of one particular individual or object is not necessarily bad ; unless such selection is not arbitrary, one can even agree with the dissenting Judges Das, J. and Patanjali Sastri, J., when they stated that other corporations were equally guilty of mismanagement like the Sholapur Company and yet the disabilities imposed by the impugned Act were not extended to such other companies. So the proposition of legislating for one individual as a particular class though logically unassailable, is very difficult in application as the chances of arbitrary selection are greater when only one particular individual or object is singled out. In *Gulf Railway Co.* v. *Ellis*[3], the principle is well laid that the selection is arbitrary if the Legislature visits a penalty upon the individual or corporation which is not imposed upon others guilty of a like delinquency.

The principle laid in *Yick Wo* v. *Hopkins*[4], that equal protection of laws extends also to *equal administration of laws*, came in for scrutiny in *Dhanraj Mills, Ltd.* v. *B. K. Kocher*[5]; where it was opined that in India such protection against executive arbitrariness does exist. But their Lordships felt that no capricious or even *mala fide* act or act in error by one official will make it actionable under Article 14 but that the discrimination alleged by executive action should be indicative of a State policy to discriminate under cover of administrative or executive power on the lines laid down in *Yick Wo* v. *Hopkins*[4].

In *Sheo Shankar* v. *State of M.P.*[6], it was enunciated that the term 'Equality before Law is a somewhat negative concept implying the absence of any special

1. (1951) S.C.J. 29 : (1950) S.C.R. 869.
2. (1951) S.C.J. 478 : (1951) 2 M.L.J. 141 : (1951) S.C.R. 682.
3. (1897) 163 U.S. 150.
4. 118 U.S. 356.
5. A.I.R. 1951 Bom. 132.
6. I.L.R. (1951) Nag. 646 : A.I.R. 1951 Nag. 58 (F.B.).

privilege in favour of an individual while the term 'Equal Protection of Laws' is a more positive concept implying equality of treatment in equal circumstances. There is one dominant idea running through them, *i.e.*, Equal Justice.

There were *several prohibition cases* arising in the various High Courts of India where the Prohibition Act was attacked as offending various provisions of the Constitution. It was impugned as discriminating between country and foreign liquor in one case *Sheo Shankar* v. *State of M.P.*[1], where it was held that there could be no discrimination smelt out, as country liquor was more harmful and the classification was not improper. It was however held that giving preferential treatment under a rule to non-Asiatics does create an inequality attracting the application of Articles 13 and 14. But the unequal application of law by the Government under its rule-making powers being unconnected with the law itself does not render the law invalid; only the administration of the law is invalid but not the law itself.

In *Fram Nusserwanji Balsara* v. *State of Bombay*[2], section 46 of the Bombay Prohibition Act which distinguished between Indian visitors to Bombay and foreign visitors was held to offend Article 14. But concessions to foreigners as a class under section 40 (1) (*c*) was found to be reasonable on the ground that the Legislature could not be expected to interest itself in enforcing standards of social reform which are peculiar to our country upon foreigners.

The Madras High Court held in *Krishnamurthy* v. *Venkateswaran*[3], that reasonable class legislation was *intra vires* and sustained, the Madras Agriculturists Relief Act (IV of 1938), as beneficial to all agriculturists.

In *V. G. Row* v. *State of Madras*[4], the Chief Justice Mr. P. V. Rajamannar felt the principle of equality before law was not violated by the existence of special laws providing for particular groups in the State; but the learned Judge would concede that such a question may arise in the application or enforcement of the impugned Act.

In *Yusuf Abdul Aziz* v. *State*[5], an attempt was made to get an adjudication that section 497 of the Indian Penal Code was *ultra vires* as it discriminated and rendered only the offending man as guilty leaving the woman scot free. Their Lordships felt that the position of women in India was peculiar in that they were subject to certain hardships such as rival wives, customary and economic dependence on man and hence there was no discrimination merely on ground of sex if women as a class were exempt from the operation of section 497. In a changing society with full equality in status attained by women in the field of divorce, property and profession, this position may however change.

The position of aliens in India is far better than those in America and other countries. The privilege of Article 14 is open to citizens and resident aliens alike. In *M. B. Namazi* v. *Deputy Custodian of Evacuee Property, Madras and others*[6]. The Administration of Evacuee Property Ordinance, 1949, was called in question as discriminatory. This plea was negatived by the Court, as after all the provisions are intended to safeguard the rights and interests of the evacuee in cases where they had left India particularly abandoning their properties. In America where aliens are entitled to the protection of both the due process clause and the equality clause there is yet a discernable discrimination against aliens.

"An auctioneer's licence may be refused to an alien. He may be denied a licence to sell intoxicating liquors or to run a pool hall, or to operate motor buses" (*vide* Weavers' Constitutional Law, p. 404).

In *Terrance* v. *Thompson*[7], the Supreme Court of America held that each State had power to deny aliens, the right to own land within its borders especially if the alien had not declared his intention to become a citizen of America. One Court put it forcibly:

1. I.L.R. (1951) Nag. 646: A.I.R. 1951 Nag. 58 (F.B.).
2. A.I.R. 1951 Bom. 210.
3. (1951) 2 M.L.J. 366.
4. (1951) 1 M.L.J. 628: A.I.R. 1951 Mad. 147 (F.B.).
5. A.I.R. 1951 Bom. 470.
6. (1951) 2 M.L.J. 1: A.I.R. 1951 Mad. 930.
7. 263 U.S. 197.

"He owes no allegiance to our Flag or our Government. He may as far as we know be plotting our destruction. Why should we be presumed to give when we receive nothing."

In India under Article 31 no person shall be deprived of his property save by authority of law and the foreigner is not prohibited from owning property in India.

Protection in law should be equal to all and so in *Kameshwar Singh and others* v. *The State of Bihar and another*[1], the Bihar Land Reforms Act (XXX of 1950), was declared as *ultra vires* of Article 14 inasmuch as there was unequal protection to various kinds of landholders. It was held that compensation value if assessed at 20 times the net income in the case of the poor man and three times in the case of the rich landholder was certainly considered as an unreasonable classification denying equality in law.

Unequal access to Courts and arbitrary procedure adopted in the special Courts coupled with a *carte blanche* power to Government to forward any case in its discretion to these special Courts constituted under the West Bengal Special Courts Act (X of 1950) was determined to be a gross violation of the equal protection clause in *Anwar Ali* v. *State of West Bengal*[2]. The Act was *ultra vires* Article 14 read with Article 13. The majority Judges Fazl Ali, Mahajan, Mukherjea, Chandrasekhara Ayyar and Bose, JJ., in forcible language opined that

"to yield such an unregulated power to Government is so fatal in the interests of justice and the principles of 'equal protection' doctrine and 'due process of law'."

In an analogous case *Lachman Das Kewal Ram* v. *State of Bombay*[3], the Bombay Public Security Measures Act (VI of 1947) was not sustained as it not only provided enhanced punishment and whipping but altogether eliminated the committal proceedings, allowed Government to arbitrarily choose the cases for trial under this Act, permitted the special Judge to record only a memorandum of the evidence and clothes him with new powers to refuse to summon defence witnesses and deprives the right of the accused for transfer of the case or for revision. The majority of the Supreme Court expressed that it was gross discrimination as between one tried under this Act and the one under the ordinary law and ordinary Courts and that Article 14 not only condemns discrimination in substantive law but also procedural law . . . . . . To pass the test of reasonable classification in class legislations two conditions are to be observed:

(1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group;

(2) that the differentia must have a rational relation to the object sought to be achieved by the Act,

Equality in law and equal protection in law was recognised in the matter of admission to Government educational institutions in *State of Madras* v. *Champakam Dorairajan*[4], where it was held that the communal G.O., which fixed the quota of each community for admission offended Article 29 (2) which guaranteed in such cases equal treatment regardless of religion, race, caste, language or any of them. In *Venkataramana* v. *State of Madras*[5], the Supreme Court again declared the communal G.O., of Madras in the matter of services as *ultra vires* of Article 16 (1) which guaranteed equality of opportunity, in the matter of public employment except to those who are classified by Government as 'Backward classes of citizens.'

Discrimination in taxation or municipal rental dues as between Government buildings and private building is also prohibited as unreasonable classification contravening Article 14, vide *Shyamal Mandal* v. *Municipal Board of Delhi*[6].

The West Bengal Social Disabilities Removal Act which enjoined that social services shall not be denied to any one of any caste was questioned in *Banamalai Das* v. *Pakhu Bhandari*[7], wherein a barber claimed his fundamental right to follow his

1. I.L.R. 30 Pat. 454 : A.I.R. 1951 Pat. 91.
2. A.I.R. 1952 Cal. 150.
3. (1952) S.C.R. 710 : (1952) S.C.J. 339.
4. (1951) 1 M.L.J. 621 : (1951) S.C.J. 313 (S.C.).
5. (1951) S.C.J. 318: (1951) 1 M.L.J. 625.
6. A.I.R. 1951 Assam 126.
7. A.I.R. 1951 Cal. 167.

calling without restriction per Article 19 (*g*) and that he should not be compelled to shave a cobler, against custom. Their Lordships held that there was no violation of the law and that the cobler should be given such a social service without unequal treatment and the words 'interest of the general public' in Article 19 would obviate any doubt even if the restriction is irksome to the barber.

Separate classification as Banks and corporations comes under the "reasonable" category and so there can be special and appropriate privileges over individuals, vide *Sikharchand* v. *Bank of Baghelkhand*[1], and *Badri Ratan Lal Rawat* v. *Vindhya Pradesh Government and another*[2]. There will also be no discrimination while redressing special problems by reasonable classification such as landlord and tenant, creditor and debtor, agriculturists and non-agriculturists, vide *Krishnamurthy* v. *Venkateswaran*[3].

Equality in law and equal protection comes under the broad head of right to equality covered by Articles 14 to 18. The second head of Fundamental rights are the rights to freedom (Articles 19 to 22). Thirdly, rights against exploitation (Articles 23 to 24); fourthly, rights to freedom of religion (Articles 25 to 28); fifthly, cultural and educational rights (Articles 29 to 30); sixthly, right to property (Article 31).

Under the first head we have studied Article 14. Article 15 removes all disabilities in respect of access to any public place on account of race, religion, caste, etc. Article 16 guarantees equal eligibility for any office or employment under the State. Article 17 forbids untouchability in any form, while Article 18 forbids conferment of titles. It must be understood that any law which discriminates between man and man in *respect of any of the rights scheduled in Article* 14 *to Article* 31 *offends against the doctrine of equality in law and equal protection of laws.*

Among the rights to freedom, freedom of speech, expression and assembly (without arms), of association, movement, of residing and settling in any part of the country, of acquiring and holding property, of practising any profession, occupation, trade, etc., are all vouchsafed by Article 19. Articles 20 to 22 guarantee personal liberty. The Supreme Court in *Rashid Ahmed* v. *The Municipal Board, Kairana*[4], with Union of India and State of Uttar Pradesh as intervenors upheld the right of a vegetable seller to vend his trade, as the action of the Board in granting a monopoly to another citizen to carry on wholesale business in vegetables deprives the petitioner in plying his trade as the Board had put it out of its power to grant any licence to him. The restriction on the dealer was most unreasonable and contrary to the provision in Articles 19 (*b*) and 19 (1) (*g*). In *Muhammad Yasin* v. *The Town Areas Committee, Jalahabad*[5], the Supreme Court held that the Town Area Committee were not vested with powers by the V.P. Municipal Act to frame bye-laws to impose a fee otherwise than for the use or occupation of any property and so the bye-law which imposed a fee irrespective of any use or occupation was declared as most unreasonable and so could not be termed as a valid law within the meaning of Article 19 (*b*) read with Article 19 (1) (*g*). Such illegal imposition was held as an illegal restraint infringing the wholesale right of the wholesale dealer to carry on his occupation, trade or business guaranteed under Article 19 (*g*).

Right to property are specially guaranteed by Article 31 by which there shall be no compulsory acquisition of property or any deprivation of property except by authority of law and just compensation. All these constitutional rights (Articles 14 to 31) can be asserted by constitutional remedies open to the citizen under Article 32. These rights are made available not only under the Union Government but also the State Governments and local authorities by virtue of the provision in Article 12.

CONCLUSION.

Of all the articles the importance of Article 13 can only be visualised by the effective shield it affords the citizen when faced with unreasonable and illegal

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1. A.I.R. 1951 V.P. 11.
2. A.I.R. 1952 V.P. 18.
3. (1951) 2 M.L.J. 366: I.L.R. (1952) Mad. 604.
4. (1950) S.C.J. 324 (S.C.).
5. (1952) S.C.J. 162: 1952 S.C.R. 572 (S.C.).

restraint on his freedom exercised by those in authority. In *Jestingbhai Ishwarlal* v. *Emperor*[1], the Chief Justice Chagla opined :

"There is no limit placed upon the power of the Court to consider the nature of these restrictions. It being the duty of the Court to safeguard fundamental right, the greater is the obligation upon the Court to scrutinise the restrictions by the Legislature as carefully as possible."

As laid in *Middleton* v. *Texaspower and L., Coy.*[2], of course :

"It must be presumed that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discrimination are based upon adequate grounds."

Again the Legislature

"is free to recognise degrees of harm and it may confine its restrictions to those cases where the need is deemed to be the clearest." Vide *Radice* v. *New York.*[3]

In *State of West Bengal* v. *Anwar*[4], the following further principles were formulated that unless a just cause for the discrimination is put forth in the law itself the statute has to be declared unconstitutional. Again the test for determining whether equal protection has been denied is objective and not subjective. Intention of the Legislature is really irrelevant. The law would be unconstitutional if discrimination is the necessary consequence of the Act, whatever may be the intention of the Legislature. Further if uncontrolled or unguided power is conferred without any reasonable and proper standards or limits being laid down in the enactment, the statute itself may be challenged and not merely the particular administrative act. Equal protection may be denied not only by legislation but also by administration of a law. The guarantee of equal protection applies against substantive as well as procedural law.

Gentlemen, I have dilated enough on the broad principles of equality before the law and equal protection of laws. Suffice it for me that I have placed my thoughts before you to ponder over what is good in it and to pardon me for the rest. I am ever so thankful to all my learned brothers of the profession and elders assembled here to have given me such a patient hearing. Please allow me to close my thesis with these words. The measure of our service to our motherland rests on the amount of public good we do in producing a sense of legalism and federalism among the ignorant multitudes of Bharat by making them feel the richness of their heritage. Our Constitution with its *magna carta* of rights and duties is the monument showing the progress of our race in securing to our citizens the blessings of civilization under the reign of just and equal laws. Our citizens must as individuals realise that these priceless gifts of the fundamental right to life, liberty and pursuit of happiness in a welfare State are secured to them. But they must also realize that our Republic is a Government of laws and not of a jumble of men. To the extent we uphold our laws, and revere our law Courts, our precious gift of freedom can be retained by us till eternity. The strident voice of humanity is now waiting for the lead of India in the emancipation of mankind and for peace on earth. It behoves us as true sons of India to be full citizens of India by growing to the fullest in our constitutional and moral stature. We shall truly strive to reach perfection in our standards of life, and promote human happiness with law and justice as our twin guiding and unfailing stars. *Jai Hind.*

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1. A.I.R. 1950 Bom. 363 (F.B.)
2. 209 U. S. 152.
3. 264 U.S. 294.
4. (1952) S.C.R. 284 : (1952) S.C.J. 55.

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CAN SOCIALISM BE INTRODUCED UNDER THE INDIAN CONSTITUTION BY AMENDMENT UNDER ARTICLE 368?

By

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The fundamental law of the nation is its constitution, from which flow various rights and liabilities (fundamental rights and obligations) to the individual in his relationship with his family, the State and Society. It is the constitution, according to Mr. Stone in ' Law and Administration ', page 130, of the State, which acts as a check on the arbitrary and oppressive exercise of Governmental power, which cannot be hastily set aside or overturned, and which cannot be affected by the clamour or action of mere temporary majorities. Thus the Rule of Law is safeguarded by the Constitution and in the words of Prof. Lasky in 'Modern Theories of Law', page 54: "The Rule of Law, if it is to be effectively binding alike upon the Governors and their subjects, must give unmistakable indications of the influences for Legislative action that it contains. And there must be in the State some positive institution or institutions charged with the function of seeing to it that these influences determine the character of the legislation. This institution may, as in the United States be a Supreme Court, or as in Great Britain, the King in Parliament."

Mr. Lasky also says that what binds the State and contributes to the good life of the State (can you say, making it a welfare State?) is the yearning for social solidarity which is in essence, the Rule of Law or respect for individual liberty and freedom, and he draws pointed attention to this fact in the following words: "From the Rule of Law, in a word, there is imposed on the State the obligation to assume to each and all its citizens the means to enable them to contribute all it is in them to give to the fullest realisation of social solidarity. It is because of this obligation that the State is entitled to use force for the achievements of its end. For all the matter that is essential for the purpose, there should be *constitutional guarantees* in the ultimate framework of the State. In such an attitude we have all the materials for a full theory of the State. Experience is to suggest in terms of social solidarity a rule of right conduct, and the aim of the State is its realisation. The State clearly is bound by the rule, that is to say, bound by law, for by the very definition, *it is an instrument and not an end.*"

The origin of the Rule of Law, whether in written or unwritten constitutions, is based on certain fundamental or basic propositions founded on certain natural rights inviolable and inviolate, and which have emerged in the process of the evolution of the human being due to the development of culture and refinement. The origin of the ideas of individual liberty, freedom and private property, are all milestones on the way from savagery to civilisation, which are recognised as healthy signs of the development of individual character and morality and thus contributing to the growth of a well-ordered society in the interests of social solidarity mentioned by Mr. Lasky. Each individual understands and recognises the others' rights, and in this way there is smooth movement of free thought and expression, and healthy action in free co-operative endeavour based on individual volition.

In the case of unwritten constitutions of the British Parliamentary type, these basic rights of freedom and liberty are protected by the ordinary law of the land,

comprised of judicial pronouncements based on custom, usages, conventions and legislations, which together constitute what is called the Rule of Law. In the words of Prof. Dicey, "the Rule of Law as distinct from arbitrary power, assures equal protection of all laws to the individual, and enables all his liberties and freedoms to be protected. In England, even assuming the supremacy of Parliament over every other organ of Government, it has been the recognised practice not to unsettle well-recognised principles of individual liberty and freedom, by Parliamentary legislation. In connection with this subject, one commentator says, that the prerogative right of the King to defend and seek the assistance of his subjects to defend the country, cannot be taken away by an Act of Parliament, and that an Act of Parliament made against natural equity and justice as to make a man judge in his own cause, is void in itself." But though this maxim is technically wrong, and has not been applied in common law as they will be contrary to the sovereignty of Parliament, yet, this rule has been applied partially by the courts, by raising a presumption in favour of the King and his subjects namely, that ordinarily Parliament would not have intended to take them away unless by express words of the statute or by necessary implication.

This subject is well illustrated in the cases in England, which decided that the King is bound by an Act of Parliament which lays down basic principles of freedom and liberty to the individual, even though the King be not named in it, and even though ordinarily the Crown is not bound by an Act of Parliament in the absence of express words or necessary implication.

In *The case of Ecclesiastical Persons*[1] it was laid down thus : "In divers cases, the King is bound by an Act of Parliament, although he be not named in it, nor bound by by express words. And therefore, all statutes which are made to suppress wrong, or to take away fraud, or to prevent the decay of religion, shall bind the King, although he be not named : for religion, justice, and truth are the true supporters of the crowns and diadems of Kings. And therefore, it is agreed in 35 H.6·60 that the King shall be bound by the Statute of Westminister, 2 Cap. 5 which makes provision against torturous usurpation, although the King is not named in the Act." Sir John Simon vehemently challenges the correctness of this observation in *Cayzer, Irvine Company, Ltd.* v. *Board of Trade*[2], but the rule has been consistently followed in later cases before courts of highest authority whatever might have been its origin. It orginated as an observation in the *Magdalen Case*[3] and it is even now considered good law. Kerr and Lawson in "Cases in Constitutional Laws", commenting on these above cases observe thus: "The Judges who decided these cases upholding the liberties of the subject have been thinking of an ideal constitution comprising these fundamental rights of common law which are so vital to the liberties of the subject and proper and efficient government of the country. These rules cannot be repealed but by statutes of direct and unequivocal statement, that is, that unless an Act of Parliament, unequivocally, by express words or necessary implication, take these rights away, all Acts of Parliament will be applied only subject to them. These rules form, and are termed as implied terms of the statute, though they do not override them."

In England certain outstanding rights are recognised : 1. Construction of statutes in favour of awarding legal right to the subject, to compensation for property acquired by the State, unless taken away by express words or necessary implication, *i.e.*, the burden of proof is on the State to establish a case for expropriation of property without compensation. See *Central Control Board* v. *Cannon Brewery*[4] and *Attorney General* v. *De Keyser's Royal Hotel.*[5] 2. Strict construction of statutes depriving the liberty of the subject *R.* v. *Halliday.*[6] 3. The protection of courts should be ordinarily extended to the subjects of the State unless statute denies it, *Chester* v. *Bateson*[7]. 4. Strict construction of penal statutes. 5. Positive and

1. (1601) 5 Co. Rep. 14-a.
2. (1927) 1 K.B. 269.
3. (1615) 11 Co. Rep. 66o.
4. (1919) A.C. 752.
5. 1920 A.C. 508.
6. (1889) 9 Crim. 428, 465.
7. (1920) 6 Const. L. 384, 450, 533.

clear enactments of Parliament alone can take away the jurisdiction of the supreme Courts of England and Scotland. 6. Courts have the right of pronouncing on the validity of subordinate legislation, whether they are *ultra vires*. (*Newcastle Breweries* v. *King*[1], though an Act of Parliament cannot be so subjected.)

In England, there is no question of suspending these fundamental rights as in America, where they can be suspended by the suspension of the constitution, but it is very doubtful if these rights can be destroyed or annulled altogether, both in England and in America, as they form unwritten laws of every constitution, whether codified or not. In a written constitution, these fundamental rights are enumerated and placed beyond the constituent power of majorities by convention though not by theory, in order that they should be stable, and not swayed as remarked by Stone, by temporary action of majorities inspired by different ideologies. These rights are the 'magna-carta' of the minority and they assure (*a*) fearless exercise of franchise at elections. (*b*) Freedom for the views of the opposition. Otherwise the successful majority might usurp the liberty of the minority by the exercise of the constituent power soon after it has become successful in an election in a spirit of political or communal revenge. In other words, it is a convention well recognised both in England and in America, that the supremacy of Parliament or the constituent power in a Republic will not affect, or would not be used in order to affect, the fundamental rights. The prerogative right of the King in Parliament to abridge the liberties of his subjects, may be there in strict legal theory, but it has been presumed in such cases, that Parliament has itself laid down the limits to, and thereby curtailed, the exercise of its prerogative. (*Attorney General* v. *De Keyser's Royal Hotel*[2]). One can call it as a constitutional estoppel.

In the same way, the constitution in America by enacting the 'Due Process of Law' clause, and especially by calling them as fundamental rights, has declared that it has set its limits on its constituent power, so far as those rights are concerned, that is, by estoppel raised by convention or public opinion. *Vide* 'The Government of the United States' by Munroe. These rights are therefore fundamental in the sense, that they are above party politics, and so beyond constitutent power, and not merely legislative power, in actual practice, though not in strict legal theory. *Vide* 'Eminent Domain' by Nichols, who says, that they are really limitations and not merely powers conferred by the Constitution. In Canada under clauses 56 and 90 of the Federation Act, the Federal Power of Disallowance, enables Acts of provincial legislatures to be disallowed by the Governor-General in Council on the following grounds : (1) because the provincial Act in question is an abuse of power and contrary to sound principles of legislation as, *e.g.*, amounting to spoliation or violation of property and vested rights under contracts or otherwise ; (2) because it is *ultra vire* and therefore invalid ; (3) because it conflicts with imperial interests or imperial policy ; (4) because it conflicts with Dominion policy or interests.

These are safeguards in the Constitution against violation of fundamental rights. Article 11 of the Japanese Constitution enacts, that fundamental rights are eternal and inviolable, and Article 5 of the American Federal Constitution enacts that no amendments shall be made depriving States, without its consent, of its equal suffrage in the Senate. The American Supreme Court has also laid down valuable judgments in construing the 'due process of law' clause in favour of the subject. As we have already remarked, that while in England these rights are permanently secured by Courts inferring the existence of such rights in all statutes in favour of subjects, unless expressly taken away by words or by necessary implication, in other countries governed by written constitutions, these rights are secured by written declarations, it being taken for granted, by all these countries alike, that the Constitution shall by convention retain these rights unrestrained by amendments effected by the exercise of constituent power. The analogy of the conven-

1. (1920) 1 K.B. 854.
2. 1920 A.C. 508.

tion in the British Parliament of not initiating any legislation of a constituent nature without the consent of Dominion Parliaments, is a matter worth remembering in this connection, as a *fundamental liberty of the States* though legally under the dominion of the British Parliaments. Such a convention must be extended also in the case of the *liberties of the subjects* when protected by fundamental rights secured by constitutional provision.

Now we shall enter into the study of the Indian Constitution with regard to the provisions laid down in this Constitution in respect of these fundamental rights and analyse them. Though the Indian Constitution in the Centre is republican in character and is governed by written declarations of the Constitution, the provincial Government is more of the model of British Parliament ensuring the Rule of Law. Inasmuch as a suspension of the Federal Constitution under Articles 352 to 359 might result in the suspension of fundamental rights, it cannot be presumed that the provincial Legislatures completely are not ruled by the Rule of Law as in British Parliament, especially when the subjects of agriculture and land, etc., are provincial subjects.

India was not a free country in any sense of the term before the Independence Act of 1947, and it was neither sovereign nor democratic, nor a Republic, before the resolution of the Constituent Assembly which enacted the characteristics of the Constitution, and also certain fundamental rights or declarations of certain rights which should govern their self-government, and according to which they have to adopt the Indian Constitution. These fundamental declarations of the character of the Indian Government, were to be copied in the enacting part of the Constitution, and these declarations of rights were embodied in the preamble, which legally is outside " this Constitution," and which by Article 368, the amending Article, applicable only to " this Constitution", *i.e.*, enacting part, is also outside the scope of amendability. These fundamental rights of justice, equality, fraternity, etc., in all spheres of activities, economic, social, political, etc., are to be the charactersitics of the Sovereign Democratic Republic, and being outside the scope of the Constitution, cannot be suspended by emergency Articles 352 to 359 of the Constitution in a permanent form, though for administrative purposes the President can temporarily rule the State as a unitary form of Government for an emergency. The Fundamental Rights Parts III and IV, are only deductions from the logic contained in the preamble, and intended to secure these rights, and therefore whatever amendment may be made to " this Constitution " can only be in conformity with the preamble containing declarations of rights. As Maxwell, in his "Interpretation of Statutes", says, "it has been sometimes said that preamble may extend but cannot restrain the enacting part of the statute. But it would seem difficult to support the proposition. The function of the preamble is to explain what is ambiguous in the instrument, and it may either restrain or expand it as best suits the intention." He also says that it is the preamble's function to keep the effect of the Act within its real scope. Refer *Kannammal* v. *Kanakasabai*[1], *Secretary of State for India in Council* v. *Maharajah* v. *Bobbili*[2], *Oudh Case* in 'Construction and Interpretation of Statutes' by P. Narasimham.

Thus it would appear that Democracy, as distinct from Socialism of the Soviet pattern, is a distinct character of the Indian Constitution which has been secured permanently free from the amending power, and the freedoms of democratic life are secured by the fundamental rights under Part III considered along with Part IV, without prejudice to Part III (individual liberty restricted in operation by social obligations), and at the maximum, these rights can only be suspended for an emergency by the President under Articles 352 to 359, thus leaving the question of their permanency unquestioned and unchallenged.

In the First Amendment case (to our Constitution) *Shankari Prasad* v. *Union of India*[3], Chief Justice Patanjali Sastri, (puisne Judge as he then was), of the Supreme

1. (1930) I.L.R. 54 Mad. 845 : 61 M.L.J. 535.
2. (1919) 37 M.L.J. 724 : L.R. 46 I.A. 302 : I.L.R. 42 Mad. 529 (P.C.).
3. (1951) 2 M.L.J. 683 (S.C.).

Court, observes: "The terms of Article 368 are perfectly general and empower Parliament to amend the Constitution without any exception whatever. In the context of Article 13

"law must be taken to mean the rules or regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of Constituent power, with the result that Articles 13 (2) does not affect amendments made under Article 368."

Two or three observations may be made in appreciating the judgment. One is, the general power of amendment under Article 368 can relate only to "this Constitution", a fact which I am afraid has been overlooked. And so what the learned Chief Justice must be deemed to mean is, that the amending power relates only to the enacting part of the Constitution, and not to the Constitution as a whole including the preamble. In other words, the preamble containing the declaration of rights is left untouched, and the amendment made to the Constitution must necessarily adopt the policy mentioned in the preamble, *i.e.*, Democracy with social and economic justice and equality, or in other words, called as Democratic Socialism as distinct from complete Socialism. In other words, the preamble can restrict the scope of the statute in the same way as it is the duty of the enacting part to adopt the principles enunciated in the preamble. I am afraid that this aspect of the question has also been overlooked.

Secondly, the amendment of the fundamental rights, Articles 31-A and 31-B are not to be construed as amendments to the principle of the right of private property *in all cases*, but these amendments which are intended to implement the Congress resolutions, and so must be deemed to be part of the fundamental rights from their inception, are intended only to apply to the special case of zamindary or impartible estates which concentrate wealth permanently in a few hands to the detriment of the livelihood of the poor, *vide* observations of Patanjali Sastri, C.J., in 1952 S.C.J. 354. To stretch the logic of these amendments to other cases of private property, hereafter, would mean that the Indian Constitution is an absent-minded juristic person, who now and then forgets to carry out its original intentions of what it meant by the term fundamental rights and proceeds to vary its principles from time to time. Once the Constitution has exercised its abridgement of the scope of fundamental rights, and thereby clearly enunciated that all other forms of private property are governed by fundamental rights, there is a clear estoppel raised that it shall not proceed on further limitation of rights granted to the people of India. The judgment of the Supreme Court in *Bihar Zamindari Case*[1] should not therefore be taken to allow further amendments of these fundamental rights with a view to an initiation of a long and continued programme of social reform depriving all persons of private property, which will mean, that the Supreme Court has decided in favour of amending the Constitution in such a way as to repeal the fundamental rights as well as the Constitution, and enacting a different Constitution governed by a different ideology in its stead. As already mentioned, it is also wholly improper to set up the precedent of amending in such a way as to open the door for the destruction of the valuable rights for which the Constitution stands. The principle of English law governed by Parliamentary practice, to read implied declarations of fundamental rights in statutes, as well as the American precedents of refraining by convention from seeking the constituent power in such cases, must be remembered in this connection, and opportunity must be given for judicial pronouncements restricting or enlarging these rights as time goes on. "If the Constitution is rigid, flexibility must be supplied from the mind of the Judges" says (Bryce in "Studies in History and Jurisprudence".

Weaver in his "Constitutional Law", pages 108 to 110, says, that the permanence and indestructibility of all the Federations must be implied from the following case *Matus* v. *Hunter*[2] (evidenced by the preamble of the American Constitution) *see* 2 Dall. 419: 1 Law.Ed. 440: 118 M.E. 544: 107 A.T.L. 673: 5 A.L.R. 1412. He says the Constitution cannot be nullified as a whole or in part by an ordinary Act of the Congress, and any Act repugnant to the Constitution is void.

1. 1952 S.C.R. 889 : 1952 S.C.J. 354 (S.C.). 2. 1 Wheat. 304 : 4 Law. Ed. 47.

Chief Justice Marshal's dictum, "It is a proposition too plain to be contested that the Constitution controls any legislative Act repugnant to it may be referred to." In regard to Amendment (19th Amendment) see *Lesser* v. *Garnett*[1], *Bay* v. *United States*[2], *Dillon* v. *Glass*[3]. Weaver says in page 251, "that the Constitution cannot pass a law curtailing our independence as a nation *or altering the form of our Government*."

Thus even in America according to Weaver and Willoughby, there is a presumption (sometimes questioned) of an inherent prohibition against amendments destroying the character of the Constitution. Though in strict theory, amendments may be revolutionary, such an Act is not recognized as normal and healthy constitutional practice. The Constitution enacted by the entire people in a Constituent Assembly cannot in fairness be so amended as to be essentially altered in character by a section of the people though they are in a majority.

The following propositions must therefore be categorically emphasised in the interest of the permanency of the Rule of Law in the Indian Republic :—

1. The vindication of the supremacy of the Rule of Law is the unquestioned privilege of the Supreme Court, and that as in America, in Canada and in England, the rule must be interpreted as far as possible in favour of the subject, and that all necessary inferences as to the existence of the fundamental rights must be presumed in favour of the subject, unless the Constitution clearly in unequivocal words says, that such rights are taken away by its constituent power. The word 'Law' is too generic a term to be cut down to the meaning of 'Legislative Power' and where there is ambiguity in the construction of the term, the benefit of the doubt must go in favour of the subject as in England and in America, where the word 'Contract' was said to include the word 'Corporations' (Justice Marshal's Judgment in the famous *Dartmouth Case*).

The American 'due process of law' secures permanence of property rights to them, and it is regrettable that this clause has been whittled down, and changed into 'procedure established by law' making these fundamental rights reduced from their important position as substantive rights, to one of procedural rights. In other words : 'You can do anything provided you stick to the form of procedure established by law' is not a happy inference, flowing from the logic of this phrase. Here again is an opportunity for the Supreme Court to establish valuable precedents in favour of the subject.

2. The burden of proof that the Articles of the Constitution deprive the subjects of property, unless it is taken away by clear words or by necessary implication, must be on the Government.

3. That the Constitution of India must be presumed to contain an inherent prohibition, for reasons mentioned above, against destroying fundamental rights and also for the following reasons :

(*a*) The preamble being outside the amending Article 368, and the Constitution being adapted to the preamble so as to suit it, makes the democratic character permanent.

(*b*) Absence of provision for destroying the fundamental rights, but only their suspension on an emergency under Articles 352 to 359, raises a strong presumption that the word 'law' mentioned in Article 13 is constituent law or power and not merely legislative law or power.

(*c*) Once an amendment has been made to the fundamental rights under Article 31 it is not open to the Constitution to further abridge these rights, as an estoppel or a self-abridgment of prerogative must be read in the case.

(*d*) The enumeration of 'fundamental rights' in the Constitution, and the statement, in essence, that no law shall restrict or override fundamental rights, mean that the 'fundamental law' from which these rights accrue, *i.e.*, 'the Consti-

1. 258 U.S. 130 : 66 Law.Ed. 505.
2. 279 U.S. 597 : 73 Law.Ed. 867.
3. 256 U.S. 365 : 65 Law.Ed. 994.

tution', assures the individual that it shall not exercise its sovereign powers by virtue of amendment, in the curtailment of such rights which have already curtailed sovereign prerogative. In other words, a constitutional estoppel or guarantee in the words of Professor Lasky, or shall we say a contract with every citizen of Free India that the constituent power will not be used except in furtherance of Parts III and IV which is subordinate to Part III, is implied.

As in America, the analogy of police power and the power of the State to regulate property affected with public interest, besides the law of public utility enterprises, will widen the scope of the exercise of sociological impact upon individual liberty without destroying it, and this will be effected gradually by judicial interpretation.

(e) It must be further pointed out that the ryotwari system has been introduced in all the lands which were previously governed by the Madras Estates Land Act by the enactment of the Zamindari Abolition Act under Articles 31-A and 31-B of the Constitution. The Estate Abolition Act confers full rights of ownership upon the tenants cultivating the lands, and therefore, it is a further estoppel on behalf of the Government by which they are precluded from going back on the new settlement, and trying to introduce any form of socialism by which private rights to property will be restricted or abolished.

(4) That as complete Socialism in India implies practically the total negation of the ideas of private property and the liberty of the individual, except as a mere tool or an instrument of the State, an amendment of the Constitution of such a nature will be virtually a repeal of the present Constitution, and enactment of a fresh one, which is called revisional legislation (*see* William Anderson on 'American Government'), for which there is no provision for representatives in the Legislatures including the Indian Parliament to act on behalf of the entire body of the 350 millions of the Indian community, and therefore any such departure from the present Constitution can be effected only on the resolution of a new Constituent Assembly appointed for the purpose.

Any law by which such an amendment of a drastic character could be justified as a constitutionally proper amendment, will, I am afraid, fall under the reproach of the famous Daniel in his words, hereunder quoted from the *Dartmouth Case.*

" By the law of the land, is most clearly intended the general law, a law, which hears before it condemns, which proceeds upon enquiry and records judgment only after trial, the meaning of this being that every citizen shall hold his life, liberty, property and immunities under protection of the general rules which govern society. Everything which passes under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, *and acts directly transferring one man's estate to another,* would be the law of the land". —(Quoted in Baldwin's 'American Judiciary').

SUMMARY OF ENGLISH CASES.

R. *v.* PEARCE, (1952) 2 All.E.R. 718 (C.C.A.).

Criminal Law—Attempt to commit an offence—Sentence could not be higher than for the offence itself.

It is not right, if a man is convicted only of an attempt to commit an offence, although technically he may be liable to a term of imprisonment at the discretion of the Court, that he should be given a longer sentence, for the attempt than he could have been given if he had committed the full offence.

If for the full offence Parliament has laid down a definite sentence, it is wrong, if a defendant is convicted of an attempt, to give a longer sentence than could have been given for the substantive offence.

NEWSOM *v.* ROBERTSON (INSPECTOR OF TAXES), (1952) 2 All.E.R. 728 (C.A.).

Income-tax—Authorised deductions—Travelling expenses of barrister between home and chambers—If could be deducted—Circumstances—Wholly and exclusively—Meaning of.

A distinction must be drawn between living expenses and business expenses. In order to decide into which category to put the cost of travelling one must look to see what is the base from which the trade, profession, or occupation is carried on. In the case of a tradesman, the base of his trading operation is his shop. In the case of a barrister, it is his chambers. Once he goes to his chambers, the cost of travelling to the various courts is incurred wholly and exclusively for the purpose of his profession. But it is different with the cost of travelling from his home to his chambers and back. That is incurred because he lives at a distance from his base. It is incurred for the purposes of his living there and not for the purposes of his profession, or at any rate not wholly or exclusively, and this is so whether he has a choice in the matter or not. It is a living expense as distinct from a business expense.

Per *Romer, L.J.*—In order that the taxpayer's expenses of travelling to and fro should qualify for tax purposes as permissible deductions from his gross earnings as a barrister it must be shown that they were incurred wholly and exclusively for the purposes of his profession.

It cannot be said even of the morning journey to work that it is undertaken in order to enable the traveller to exercise his profession. It is undertaken for the purpose of neutralising the effect of his departure from his place of business, for private purposes, on the previous evening. In other words, the object of the journeys, both morning and evening, is not to enable a man to do his work, but to live away from it.

CIVIL AIR TRANSPORT INCORPORATED *v.* CENTRAL AIR TRANSPORT CORPORATION, (1952) 2 All.E.R. 733 (P.C.).

*International Law—Recognition of foreign government if could be retroactive in effect —*De jure *and* de facto *governments—Sale of property by a government since superseded by another—Validity of sale—When can be questioned.*

The paramount importance of the principle of continuity, *i.e.*, of a succeeding government accepting what has been done by its predecessor cannot be read as authorising a Court to treat as a nullity political decisions and actions of a former government which have resulted in the transfer of property to third parties. At the same time the possibility of Courts refusing, in a conceivable case, to recognise the validity of the disposal of State property by a government on the eve of its fall, *e.g.*, by a despot, who knows that previous recognition is just being withdrawn, where it is clear that his purpose was to abscond with the proceeds, or to make away with State assets for some private purpose, cannot be overruled.

Subsequent recognition *de jure* of a new government as the result of successful insurrection can, in certain cases, annul a sale of goods by a previous government. If the previous government sells goods which belong to it but are situated in territory effectively occupied at the time by insurgent forces acting on behalf of what is already a *de facto* new government, the sale may be valid if the insurgents are afterwards defeated and possession of the goods is regained by the old government. But if the old government never regains the goods and the *de facto* new government becomes recognised by Her Majesty's Government as the *de jure* government, purchasers from the old government will not be held in Her Majesty's Courts to have a good title after that recognition.

Primarily, at any rate, retroactivity of recognition operates to validate acts of a *de facto* government which has subsequently become the new *de jure* government, and not to invalidate acts of the previous *de jure* government.

It might be too wide a proposition to say that the retroactive effect of *de jure* recognition must in all cases be limited to acts done in territory of the government so recognised, for the case of a ship of the former government taken possession of by insurgents on the high seas and brought into a port which is under the control of the *de facto* government would have to be considered.

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DEMOCRATIC SOCIALISM AND ITS IMPACT ON THE INDIAN CONSTITUTION*

By

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Great political leaders, like Mahatma Gandhi and the Hon'ble Pandit Jawaharlal Nehru and revolutionary reformists like Lenin and Stalin have remarked that imperialism is the chief capitalistic enemy of true economic democracy and the last war demonstrated the utter failure of capitalistic nationalism to solve international problems unless it is imbued with a true desire on the part of every nation to temper its principles of political democracy with altruistic and socialistic ideals of economic democracy. "The failure of Parliamentary Democracy is not that it has gone too far but that it did not go far enough. It was not democratic enough because it did not provide for economic democracy and its methods were slow and cumbrous and unsuited to a period of rapid change. (Jawaharlal's Autobiography, page 530-52)". A nation having a centralised administration with power concentrated in the hands of the few oligarchs controlling all the means of production in the state, must naturally drive the unemployed have-nots in quest of foreign land, to satiate their hunger, and itself be the instrument of suppressing democracy and the fondly cherished civil liberties of the subjects in the land of their conquest. *Vide* Lenin on "Imperialism the Highest Stage of Capitalism". The subjects of the conquered state must necessarily be content to be mere wage earners without any initiative or individuality in commerce or industry. This imperialistic hunger is a never-ending hunger and while annihilating all that is good and great in civilised man by the creation of the inferiority complex in the governed, it becomes at the same time the repository of suspicion and fear, and in the name of defending its possessions from conquest, proceeds to arm itself, and endangers thereby the liberty of every other nation including its individuals. Thus, problems of individual liberty both in the political as well as economic sphere, have a distinct and far-reaching effect on not only the welfare of the state but also on the peace and well being of the world. Economic democracy is therefore not merely a national question, a question of domestic politics but one of world or international importance. *Vide* Findings of Asian Relations Conference in Delhi in April, 1947.

The history of the development of economic democracy is connected with the development and application of the principles of philosophy enunciated by Plato, Rousseau, Mazzini and Hegel to political thought in the west. The origin of Fascism and Nazism, according to Wyckam Steed in his book on 'Way to Social Peace,' page 49, is to be found in the political philosophy of Hegel. From it Karl Marx and Frederik Engels, drew and expounded ideas in their joint work 'Capital' and in their Communist Manifesto of 1848. The Marx Manifesto clearly attributes all the evils of society to a never-ending conflict of class warfare which can end

* A lecture delivered on 24th April, 1953, in the Study Circle of the Provincial Bar Federation, Madras.

only by the destruction of middle class who are in control of all power of wealth in the form of industry or land, and the solution of the problem lies in the distribution of the means of production to all. Therein alone lies the way to the ending of the hostility of one nation to another.

The Marx doctrine was assimilated by different nations who adumbrated different idealogies, but having this distinct common platform that the individual must bow down to the higher mandate of either the state or the society or the nation. The mandate of the state was clearly expressed in the collectivist theory of the state which assumed the form of Fascism of Mussolini. The mandate of society assumed the form of Socialism or the Russian Communist ideology enunciated by Lenin and Stalin. The mandate of the nation assumed the form of the National Socialism of Hitler; in all the three ideologies, individual interest was to be subordinated to a wider conception in varying degrees, but it must be remembered that both Fascism as well as National Socialism wrested power from democracy and became its powerful enemy by centralising power in dictatorship, thus annihilating individuality itself and not merely individual liberty. In Fascism and Nazism, individual liberty was largely curtailed, whereas in Socialism of Russia, individual liberty was enlarged to make it co-equal with the interests of society, with the result that there was to be no individual apart from his being an instrument of social progress. Fascism and Hitlerism had to arm themselves and be the protagonists of warfare, and they attempted to spread their philosophy by the achievement of their imperialistic ambitions.

The principles of economic democracy in Europe, sprang up as a result of the French revolution and the wars between France and England. The famous declaration of the Rights of Man in the French Constitution of 1789 was followed by other constitutions, the Italian and the German. The beginnings of the 20th century witnessed the rise of the principles of Liberalism, Social democracy, Syndicalism, etc.

In Italy, Social democracy arose as a remedy for the economic ills consequent on the war between England and Germany in 1914. It was Mussolini, leader of the Fascist party who usurped the powers of Government as a Dictator soon after the Russian Third International which started the movement. Catholic Pope who was opposed to the preaching of Socialism spread a new Gospel of Christian democracy to counteract it. A new party called the Party Populae was started to destroy the "Burgeois". Donsturgo, a priest preached radical doctrines against the Burgeois, and recommended distribution of land. The National party was a third party which preached Mazzini's doctrines. Socialists were for distributing lands but the Nationalists were not so keen. Finally the Fascist party of Mussolini and the National party were amalgamated in 1923 and the Fascist State came to power. The ideal of the Corporative State was thus evolved. The proudest boast of Fascism, according ing to Henry Russal Spencer in his book on "Government and Politics of Italy", "is in solving the world wide puzzle, of how capital and labour may be led out of the sterile, destructive struggle for mastery at the nation's expense, and converted to methods of social integration and to orderly working side by side in the nation's economic effort. Co-operative production, not competitive distribution becomes the major economic interest. The state without itself engaging in socialist production or distribution, is to secure social justice by authoritatively apportioning productive tasks and securing the appropriate distributive rewards that automatically result".

The Italian Constitution speaks of certain fundamental rights. It calls these rights as Rights and Duties of Citizens. Under Article 24, all are equal before the Law, all should contribute towards the state and in proportion to their possessions. Individual liberty is guaranteed, the dwelling house is inviolable and domicile is protected. Under Article 29, all property without exception is inviolable. Nevertheless when the public interest legally ascertained requires it, a person may be bound to give it up, in whole or in part, upon payment of a just indemnity in accordance with law."

But with all this, it must be said that liberty as preached by Mussolini was in practice the liberty of the state and not of the individual. Mussolini himself defined liberty as the only freedom that can seriously be considered—the freedom of the state and of the individual within the state ", which means that Fascism is for the state—and for the individual so far as he coincides with the state. Fascism does not restrict individual freedom but what it not only restricts but exterminates is his individuality. Mr. A. B. Ashton in his book on the ' Fascist, His State and Mind,' pages 110 to 116, says that the liberty of action for the Fascist individual regardless of the stand of the community is a logical impossibility from the collectivist point of view. Hence the judiciary became merely a branch of the administration authorised to enforce and effectuate among the members of the community the collective will as proclaimed by the community. The courts turned into mere agencies of administration from being an independent arm of state power. " In the democratic country the individual is subject to the law which however is not allowed to infringe upon his specially protected rights. In other words the law signifies the worst that democratic community can do to their single members. In the Fascist State the relation is reversed. The individual is bound and restricted anyway, by virtue of the fact that he is a member of a collective body, to the behaviour pattern required by the communal interests and its many synonyms like ' Fascist Spirits ', ' some popular feelings '. As a German Jurist remarked, in Italy, the will of the state was the soul of the law. In English parlance this aspect of the matter will be viewed as negativing the citizen's right to ' equality before the law ', which is cherished by all liberty loving people. Fascism does not believe in a justice independent from the group or society adminstering it. They admit it cannot be an absolute justice. But they cleverly contend that all justice proceeds on communal interests. Another objection which is raised by all liberty loving people to the Facist theory, is, that it destroys the very certainty which according to well-known principles of jurisprudence constitutes good law. The Fascist answers this charge in this way, that the individual being a member of the community must be presumed to know, to feel, and participate in the collective will. This is Fascist organic conception of the state, *viz.*, that the will of the state is the soul of the law, which conception has supplied so much protection to the lawless despotism of the Fascist. Fascism authoritative in principle and totalitarian in conception, thus refused to be controlled by individual norms. There was absolutely no department of governmental activity free from the influence of this doctrine. Universal conscription became the rule not only in military matters but also in the employment of labour. The Fascist Press became the mouthpiece of the communal will and purpose. " In dealing with the intellectuals, in conquering or crushing them one by one, the Fascist regime exhibited the most accomplished refinement of cruelty " *vide* page 126, Fascism—who benefits " by Max Ascoli and Arthur Fcilar of the University in Exile "!

The economic organisation in Italy is outlined in the corporate theory, the Cartedel Laboro of 21st April, 1927, which was proclaimed by the Grand Council of Facism in 1927. They are general principles generally followed in the Republic to frame laws. In 1934 Parliament was abolished and a National Council of Corporation was established. Article I of the Carte del Laboro says that the ancient and powerful Italian nation stands above the single or combination of individuals as an independent organism of superior value and represent the Fascist State and that labour of all forms is a social duty, and only as such, protected by the State. The process of production is for the nation, an indivisible whole. Its purposes, without distinction, are one and the same individual well-being, and furtherance of the state power.

Article III.—Professional and labour organisation is free, but only the legally recognised and communally controlled organisation has the right to speak for the entire category of employers and employees for what it is established, to represent their interests before the state and against other organisations, to make collective agreements binding upon all members of the category, to collect dues from them and to exercise all public functions conferred upon it.

Article IV.—The collective agreement serves to express the solidarity of different factors of production, by compromising the conflicting interests of employers and employees and subordinating them to the higher interests of production.

Article V.—The labour court is the organ employed by the state to decide labour conflicts.

Article VI.—The legally recognised corporations assure the legal equality between employers and employees, maintain discipline in production and labour, and aid in its improvement—" since interests of production are national interests, the corporations are legally recognised as organs of state."

Article VII.—The corporate state considers private initiative and production the most valuable and the most effective instruments for the protection of national interests. " Private organisation of production is a national function of the employer. He is therefore responsible for it to the state. Employees are active collaborators in the economic enterprise the management of which is the employers' function and responsibility.

Article VIII.—It is the duty of employer associations to direct all their efforts towards the increased and improved production and towards decrease in prices.

Article IX.—State interference in economic affairs takes place only where private initiative is lacking or insufficient or where political interest of the state are affected. Such interference can take the form of supervision, aid or direct assumption of control ".

In agriculture, Fascist farm policy was interested in getting practical results. Mussolini's farm programme was of two kinds : 1. Bonifica integrale or large scale reclamation undertaking. 2. The battle of the grain, which was a drive to raise the wheat output. Organisation of agriculture was intended to achieve these ends. The farming population becomes a favoured and protected population and farming takes the character of one of communal interests as different from a purely private business. " Fascism defended and encouraged private property in the form of small ownership as it recognised the economic liberty secured by the institution of private property and as it also breeds the maximum of initiative and as possession of private property is also an opportunity for the individual to acquire responsibility to society. The right to acquire property and transmit it are the corner stones of fascist policy. In Italy, the number of small farmers or part owners form a very large proportion of the population, also small shop keepers, small independent business of all kinds, including artisans " (Fascism by Major J. B. Barnes, pages 162-4). This results in the complete abandonment of concepts governing capitalist agriculture. Capitalism assumed secondary importance. The German ideal was also similar in purpose, though in methods different, as we shall see hereunder, under the German constitution of 1919.

THE CONSTITUTION OF THE GERMAN FEDERATION OF 1919.

The German Constitution was based on Liberty and Justice intended to serve the cause of peace, domestic and international and to promote social progress. Article VII (12) and Article VII (13) deal with the socialisation of national resources and of economic undertakings and the production by manufacture, distribution and regulation of prices, of economic commodities under social management. Under Article 48 if the state fails to perform the duties imposed upon it by the Federal constitution or the Federal law, the President of the Federation, may enforce performance with the aid of armed forces. If public order and security are seriously disturbed or endangered within the Federation the President of the Federation may take all necessary steps for their restriction, intervening if need be with the aid of armed forces. For the said purpose he may suspend for the time being, either wholly or in part, the Fundamental rights described in Article 114 Personal Freedom, 115 Residence, 117 Secrecy of Correspondence, 118 Freedom of Expression, 123 Right to Assemble, 124 Peaceful Associations, 153 Property which is guaranteed by the Constitution. The contents and limits of right of property.

are defined by laws. Expropriation is admissible only in public interest and so far as authorised by law and is accompanied by *adequate* compensation unless a Federal Law otherwise determines—the constitution further says that property entails responsibilities, it should be put to such use as to promote at the same time the common good. Section V deals with economic life. Organisation of economic life is in accordance with the principle of justice and aims at security for all conditions of existence worthy of human beings. Within these limits, the individual is to be secured the enjoyment of economic freedom. Legal compulsion is admissible only so far as is necessary for the realisation of threatened rights, or to serve overriding claims of the commonweal. Freedom of trade and industry is guaranteed within the limits prescribed by Federal laws. Article 154 deals with the right of inheritance which is guaranteed, but the state fixes laws for taking its share in the estate of the deceased person. Article 155 relates to the distribution and use of land which are to be under state supervision, with a view to the prevention of abuses and in order to secure for every German a healthy dwelling and for all German families especially large ones, according to their needs, suitable homesteads and small holdings. In the law to be enacted concerning homesteads the claims of those who have taken part in the late war will receive special consideration. Land may be expropriated, if required for houses, for settlements for bringing it under cultivation or for encouragement of agriculture. Entails are to be broken off. The cultivation and utilisation of the soil is a duty which a landlord owes to the community. The unearned increment in the value of land is to be used for the benefit of the community. Article 156 regulates socialisation. The Federation may by law without prejudice to the claims to compensation and with a due observance of the rules governing expropriation—convert into social properties such private economic undertakings as are suitable for socialisation.. It may assign to itself or to the states, or to the local committees, a share in the management of economic undertakings or of their combination or otherwise secure for itself a decisive influence therein. Further more in case of urgent needs, the Federation may provide for the compulsory formation of self-governing syndicates out of economic undertakings and their combination, with a view to their management on social lines—the motive being to secure the co-operation of all productive sections of the community, to secure the participation of both employers and employees in the management, and to regulate on principles of social economy the production, manufacture, distribution, uses and prices, as well as import and export of economic commodities. Upon their demand, co-operative, industrial, and trading societies and their unions are to be incorporated into the socialised economic system, due regard being had to their Constitution and their secular character.

Labour, intellectual work, fine arts, etc., are all protected. Freedom to combine for protection of labour, etc. and the leave and pay of labourers are guaranteed. Health insurance, maternity insurance, insurance against old age and infirmities are all guaranteed. Women are guaranteed general minimum of social rights. Every German is given a chance to earn a living by economic labour.

Article 164.—The interests of the independent middle class engaged in agriculture, industry and trade are to be furthered both in legislation and administration. It must be protected against excessive burdens and against the risk of absorption.

Article 165.—Co-operation between workers and employers are recognised, and agreement enforced in regard to wages and conditions of labour. Bills of fundamental importance in relation to matters of social and economic policy, before being introduced in Reich Stag shall be submitted to the Federal Government, to the Federal Economic Council, for an expression of its opinion.

Article 107.—There must be administrative courts, in virtue of laws both in the Federation and the State, for the protection of the individuals against orders and decrees of the administrative authorities.

The fundamental rights of the individual are enunciated from Article 109 onwards.—All are equal before the law—men and women have the same political

rights and duties, privileges and disadvantages of both arising from birth and rank within the sphere of public law are abolished. *Article* 114—Freedom to move from one place to another, to acquire land and to follow any calling. *Organisation of Federal Economic Council* and the system of council under them are reviewed by Oppenheim in his book on the 'German Federation'. He says one more organ of Government claims attention, the Federal Economic Council to which as will presently appear, a subsidiary share in legislation is assigned by the constitution. This is a body of an entirely novel character, without parallel in the public law of any foreign state. "It is hardly necessary to repeat here that anything in the nature of a class regime, any institution suggestive of a proletarian dictatorship, either in the central government or in that of the states, is absolutely inconsistent with both the letter and spirit of the constitution. As a reporter of the committee of the constitution explained " the basic aim in setting up the council, is to establish by the side of the political organisation of the state, an independent economic organisation which is to be entrusted with the task of solving economic problems with the aid of the economic forces themselves." The root idea appears to be a logical deduction from the philosophy of Hegel developed in the economic field by his disciple Lawrence Vonstein, that industry is always monopolised by capital every time it is used by any organ of government. A similar range of thoughts inspires Saint Simon and culminated in the Marxian Doctrine of Class Conflict—which in Russia "was solved by the organisation of the struggle of the proletariat which is the essence of the system of councils as set up in the Russian Soviet Republic." Mr. Oppenheim pleads for a *via media* between these extremes and he finds the solution only on proceeding on democratic lines. "That is, without in any way denying the reality of conflicting interests, the school of thought at once attempts to provide organisation, through which they can be harmonised and legalised". It is essential that in a matter of such social importance, both parties should leave off their attempt to run on parallel grooves and reconcile their conflict, leave out their idea of the one dominating the other, and to meet on a footing of perfect equality. The attempt was to decentralise democracy into two units, political and economical "Moreover the democratic principle favouring detachment, gave a powerful impulse to the tendency towards self-government in the economic as in every other sphere. Democracy in the German Constitution is not only the ruling political principle, its spirit also permeates the whole of the social and in particular the economic fabric. The age of autocratic Government and of the absolute supremacy of capital in industry belongs to the past". These were the foundations of the German constitution and as we will see later on, the Indian constitution also puts both political democracy and economic democracy on a footing of perfect equality, as laid down clearly in their declaration of rights contained in the preamble.

The fundamental rights mentioned in the German Constitution are limits imposed on the omnipotence of the state by assigning to the indivudual the sphere within which it was free to move in complete independence, immune from all official interference. The Declaration of 1789 mentioned it as an inalienable heritage belonging to man under the dispensation of the Law of Nature (Droits de l'home) or as Droits due citoyen or as originating in a constitutional grant, *i.e.*, in positive law, as for the first time in their charts constitutionallé of Louis the XVIII of 1814, where they are treated under the significant heading "Droit public des Fancais". It was from the latter source that American constitution introduced the Fundamental Rights in their constitution, either directly, or through the medium of the Chapter 'Des Droits des Belges' in the Constitution of 1830.

The Weimer Constitution, specifically mentions fundamental rights, though the Imperial constitution of 1871 and the Republican constitution of 1875 do not contain fundamental rights. Both the Prussian and the Government drafts leading up to the Weimer constitution, contain short sections enumerating fundamental rights, which was finally adopted by the National Assembly after much difference of opinion and discussion. It was called by Dr. Nauman as the German people's political bible, as a primer of German Public Law. Both the German constitution of 1849 and the Prussian constitution of 1848 and 1850 mention fundamental rights. They

speak of them not merely as bricks in the building but also as the bread of the life of the constitution.

This system of German Government, underwent great changes by the growth of the National Socialist Party headed by Hitler in 1923. Hitler's 'Mein kampf' defines, and defends the necessity for a strong middle class in its programme of the National Socialist Party. Germany enters the Third Reich. Before the Nazis came to power, the collective economic organisation was mainly intended to protect individual rights and interest. Trusts abounded in industries, and the German Trade Associations enjoyed great powers. The public were accustomed to the use of the co-operative societies, labour relations were dependent on collective bargains, labour unions were amalgamated in the social democratic Free unions. Nearly 90 per cent. of trade and commerce were regulated by collective agreement between industrial unions and representative bodies of employer, and not between individuals and unions. The Nazis before they came to power, established "plant cells" in almost every organisation of governmental activity. These cells were units under which, certain trusted individuals in each organisation, were entrusted with effective power to control and regulate organisations. After the Nazis took charge of the Government, these cells were organised into the "Nationalist Socialist Planned Self-organisation". Regional labour trustees were appointed to safeguard labour wages, in 1933. Labour structure was absorbed in German Labour Front, a new organisation. In January 1934, the law for the organisation for the Nazi labour, enumerated the principles of capital and labour relations, as one of social responsibility fastened on the employer as 'leader', to be supervised by Government labour trustees. In 1934, organisation of labour front was made to agitate for labour problems. The Reich Chamber of Economics, was constituted as the head of the commercial organisation under the Minister of Economics, with 13 main divisions and 2 separate divisions, supervised by the Chamber of Commerce, and in 1936 the Labour front incorporated the Reich Chamber of Economics as its Economic Department. Thus the whole of Government industries came under the direct control of the Reich.

The essence of the German scheme as embodied in Articles I and II of the Law for the Organisation of National Labour are:—1. In a business enterprise, the owner as leader, and the employees as followers, shall work together to further the purpose of the enterprise, and for the common good of the nation and of the state. 2. As between the leader of the enterprise and the followers, the leaders may call for decisions concerning the enterprise. "He is to take care of the welfare of the followers. The followers are to keep faith with him in a spirit of solidarity in a common enterprise".

In Germany, the method of approach in farm policy was similar to the labour front in business. An institution called the 'Reichsnahrstand' an agricultural Corporation, was formed, whose purpose was to cement a perpetual bond between the soil and the peasant.' By introducing a Farm Inheritance Law, the Entailed Farms law of 1933 which was intended to preserve the Farms of German agriculture in blocks of small and medium sized holdings. The policies and purposes to be adopted in the matter, were left to experts in the organisation and in the Government agencies controlling them. The farming class is treated with great favour by Germany and given personal protection. In comparing this with Indian Agriculture, it might be remarked that the transition from the patriarchal family living on undivided common land, to a joint family which by partition lives upon land in its exclusive possession, as described by Mr. Maine in his book on Hindu Law, must be presumed to have been intended for the preservation of blocks of small and medium sized holdings in India. The religious conception of a joint family law of survivorship and inheritance must have been adopted as a practical and empirical mode, under legal cover, of conserving these small blocks without being frivolously distributed by fragmentation.

The Irish Free State also embodies fundamental rights in its constitution. The country is mainly dependent on agriculture and there are not many industrial

towns in Irish Free State. The official Year Book published by Northern Ireland is itself a sufficient proof that the economic life of Ulster is the same as the rest of Ireland. Agriculture is the main industry of the province. All land have been completely nationalised by the State. Mr. Justice Hanna in his book "The Statute Law of the Irish Free State" gives us valuable information regarding the mode of purchase of land adopted by the Government in nationalising the industry. All net income by way of rents from lands were calculated on the average basis of 75 per cent. of their rents and capitalised value was calculated at 15 years' purchase of the above basis with 10 per cent addition. Land bonds were issued to the landholders carrying interest at 4 per cent. The tenants repurchased these lands on an annuity basis. The Agricultural Credit Corporation of the State advanced money to Government as well as the tenants to redeem holdings and for making advances towards purchase by tenants of the proprietors' rights. In distributing lands, an average of 10 acres per individual is reckoned. These are valuable data for the planning Commission in determining ceiling on large holdings, and the mode of purchase of properties, which may be suitably adapted to Indian conditions of agriculture.

The Soviet Constitution, which is based on the principle 'He who does not work cannot eat' has completely nationalised all the means or sources of production. The Soviet Republic of 1918 in Article 22 says that "the Russian Socialist Federal Soviet Republic, recognising the equality of all citizens before the law, irrespective of race or nationality declares it contrary to the fundamental laws of the Republic to institute or tolerate privileges or any prerogative whatsoever, founded on such grounds, or to repress national morals or in any way limit their rights".

Article 23.—In the present interests of the workers classes, the Russian Socialist Federal Soviet Republic deprives individuals and sections of the community of any privileges which may be used by them to the detriment of the social revolution. The All Russian Congress of Soviets is the supreme authority of the Russian Socialist Federal Soviet Republic. The Constitution divides property into two categories: 1. Means of production; 2. Articles of consumption. All means of production belong to the state, *i.e.*, socialised *i.e.* land, waters, forests, mills, factories, railways, transport, trades, the banks, concerns, municipal corporation, etc. Articles of consumption are personal property under which category are included dwelling houses, furniture, utensils, clothing, etc., besides food. Means of production are socialised and left under the charge of co-operative societies, public organisations, etc. All citizens under Soviet Union have an equal right to a life of well-being. This does not mean that the standard of life of all is the same, that wealth is divided among them equally. Personal property consist equally of money and the articles of consumption, only rarely of means of production. Rural inhabitants, collective farmers, may have their subsidiary plots and cultivate them, and keep cattle and poultry and pigs and acquire implements. Their subsidiary holdings are not intended to serve the principal purpose of being means of livelihood but only to supplement the income derived from collective or social production. Personal properties are at the disposal of the owner and may be bought or sold or donated or pledged but they should not be used as a means of exploiting labour, or be the object of profiteering or usury. On the death of the owner, personal property passes to his heirs. The constitution makes specific provision for safety of personal property. Persons intending to build houses are given free gifts of plots and free building materials; furniture, etc. and cows can be purchased on easy terms. Loans are granted by the State on two per cent interest on instalment system.

Private enterprise is allowed to those persons who do not desire to take part in socialised or collective enterprise. It may be farming, handcraft or in one of the learned jobs or professions. Private enterprises must depend only on individual labour and not hired labour. In Lativia, Lithunia and Esthonia farming can be done with private labour or in private owned workshop, but not more than three labourers can be engaged.

Property is owned jointly, each one having a distinct share and inherited by each one's heirs. Bequests are held jointly if made to two or more persons. "The system of property relations established by the law and constitution of U.S.S.R. *is based* on the principle of harmonising the interests of Society with the interest of the individual citizen. Socialist Property promotes the augmentation of the national wealth and of the national income of the Soviet Union, and hence the improvement of the standard of living of its citizens. It makes it possible for the people to plan their national economy in their own interests. It was the socialist ownership of the Soviet people of the means of production that enabled them to defeat Nazi invaders and to uphold the liberty and independence of their country". Andrey Y. Vyshinsky says that in no democratic constitution of the capitalistic type have fundamental obligations been attached to fundamental rights, and that the Soviets pride themselves in having fundamental rights and obligations in their constitution under section 3. The Soviet principle of completely nationalising all means of production will not be suitable to Indian conditions of agriculture, its Property Law or the Personal Law of the Hindus as mentioned earlier in my Article on Land Reforms in India, published in the Madras Law Journal on 11th December, 1952 and Madras Law Weekly on 21st February, 1953. It might cause acute financial depression in India if land which is the credit structure of the whole fabric should cease to be a species of private property. Agricultural and commercial debts and credits will have to be disowned, and wiped off. Inheritance Law will have to be abolished. Religion will cease to have any spiritual motive force. Under these conditions, the Soviet Constitution will not serve the purpose of giving us a stable constitution suited to our traditions but a nearer approach towards the other continental and Irish Constitution may be made with a view to finding out a compromise between extreme political democracy and radical communism. Sir M. Visweswarayya's book on Planned Economy in India gives a very valuable guide. "The Indian plan must avoid Communistic tendencies". "Despite its many efforts, even Russian Communism has not been able to eschew capitalism altogether. In Communism, there is still inequality of earned income "each one to earn according to his ability". (2) There is private ownership of capital. (3) Inheritance is allowed. This was first abolished and then Exception Bill was passed allowing inheritance of personal property. (4) There is receipt of unearned incomes by individuals provided that the income of the rich is not too large a proportion of what is available for all.

The Japanese Constitution also speaks of freedom of person and liberty of the subject "within the limits of the law" and that measures may be necessary to be taken for the public benefit and should be provided by law.

The Constitution of the Polish Republic of 1921 in Chapter 5 talks of general duties and social rights and in Article 99 expressly reserves power for the state to determine what kind of property and within that limits, property can be in exclusive ownership of the state, on grounds of public utility and also the limits to be imposed on citizens. Land must not be a subject of unlimited alienation being one of the principal factors of the life of the Nation. The Laws shall prescribe the degree in which the state has the right of compulsory purchases of real property, and of controlling the transfer of such property in conformity with the principle that the agrarian structure of Polish Republic ought to be based on agricultural holdings capable of normal productivity and of being privately owned. Dwelling house is inviolable and labour is given special protection. This illustrates that agricultural holdings in India also should be of a reasonable size capable of normal productivity and privately owned. Land must be an economic unit capable of maintaining a family with absorbing interest and no use will be served by reducing the size of the holdings making them uneconomical and inefficient for management.

The Constitution of the Kingdom of Serbs, Croats and Slovens in 1921 lays down provisions of fundamental rights and social and economic plans and gives the right for the states to intervene in economic relations between citizens in a spirit of justice and in order to avert social conflict. Agricultural insurance shall be

regulated by special regulation. Insurance against unemployment, disease, old age, etc., are provided. Private property is guaranteed but it should not be injurious to the interests of the community. The scope, extent, and limits of private ownership can be regulated by Law. Expropriation is wholly for legitimate public utility and with fair compensation. Article 43 lays down that a maximum extent of landed property, and the cases in which a minimum holding of land may not be alienated, shall be determined by law. An economic council under Article 44 is constituted to determine and decide on economic and social legislation. The significance of this constitution to Indian agriculture is the provision for insurance of various types which can be secured by Parliament in implementing the Five-year plan and besides regulating the minimum extent of land to be cultivated by any individual or family and the scope for the establishment of an Economic Council in India to regulate the social and economic relations in their application to problems coming under Parts III and IV of the Indian Constitution.

Now that we have made a study of some of the outstanding Continental constitutions working out the principle of economic democracy either as a measure of social reform or as a measure of an economic revolution, each in its own way, it is our purpose to emphasise this aspect of the supreme importance given to fundamental rights of the individual, uniformly in all the constitutions. It cannot also but be remarked that except in Russia, in every other constitution, special provision has been provided for the acquisition of individual property on fair and adequate compensation. (Weaver 'Constitutional Law', page 553.) But it must also be remarked that none of these constitutions give the individual his true place either in the state the society or the nation. Dominance of the state over individual initiative to the extent of expropriating it for one reason or the other is the guiding theme of the continental constitutional philosophy. The Indian Constitution breathes an entirely different atmosphere where individual character can mould itself according to the spiritual traditions inherited by every Indian and at the same time realising the fraternity of man as the common bond of allegiance to the nation or nations as we shall see hereunder.

The conception of individual subordination to society, to the extent of annihilating individuality, and not merely individual liberty, has not been approved by political thought in England and America, and the present day tendency for public opinion in these states is crystallising towards defining individual rights on a mathematical formula of minimum rights and maximum rights either in Industry, Finance, Commerce or Agriculture. ('Province and Function of Law' by Stone, page 774.) The ideal of welfare state is making rapid extension in all these states and has also permeated the Indian Constitution. Great spiritual energy and social amelioration was released to the masses in India by the historic temple entry proclamation in Travancore initiated by the Maha Rajah of Travancore on the advice of Sir C. P. Ramaswami Ayyar, the then Diwan of Travancore, and which was followed by other states and provinces. The Labour and Trade Union movements were recognised and strengthened by the Indian National Congress. Prohibition was introduced in Madras on the initiative of Sri C. Rajagopalachari, Premier of Madras and his example was followed by other provinces and states, thus securing decency of living to the poor man, besides setting up a proper moral code to both the rich and the poor. The last war has demonstrated, that unless economic democracy is established in some form of social adjustment or compromise, though not based essentially on rights, the never ending class struggle will perpetuate international conflicts of the worst type, thereby increasing postwar problems of unemployment, inflation, poverty, sickness, etc.

Paul M. Sweezy writing on (Socialism) says, that socialism is any devise or doctrine whose aim is to save individuals from any of the difficulties or hardship of the struggle for existence and the competition of life by the intervention of the state. In England, the principle of socialist democracy, or democratic socialism which will be the apter word, is coming to be recognised, and the Fabian Society has contributed much towards the growth of socialistic ideas consistent with demo-

cracy. The Encyclopædia of Brittanica, 13th Edition, defines socialism as follows :—
"According to James Borar, socialism is that theory which aims at securing by the action of central democratic authority, a better distribution, and in due subordination thereto, a better production of wealth than now prevails. State socialism in England is opposed to the theory of regimentation of the individual. Only selected industries are nationalised for appropriate reasons, *e.g.*, the Railways, Coal, Iron, Electricity, Iron ore, etc. There are different types of social insurance and poor laws" (*vide* Conflicting Factors of Economic Development by Harol G. Moulton 1947).

Devy Thompson writing on this subject in his book 'On the Democratic Ideal' says, that the precise meaning of economic democracy is still a matter of profound dispute among democrats. A few laws stand out, but as yet they form no pattern. It involves permanently such distribution of wealth as will prevent the present extremes of poverty and wealth, the prevention of large scale unemployment, and provide security of work without exploitation of workers for the private fortunes of a few, but he says its observance in agriculture is still a matter of controversy in England and France, that is, whether the states should own land and control it. Leaders of political thought in England like G. K. Chesterton and Bertrand Russel advocate 'Distribution' of private property as a preserver of liberty and social justice and social security and personal dignity, which arises whenever a man owns a little bit of property and is himself an owner producer (*see* 'Principles of Reconstruction' by Bertrand Russel, page 137). Small capitalism, according to him, must exist and emulate by the side of socialism in order to preserve democracy.

The labour party in England in their manifesto declare that they are committed to a policy of liberalising the administration in order to have a socialised and economically just Government and they contemplated in the last resort expropriation of property for compensation. Sir Stafford Cripps in his book on 'Democracy up-to-date', page 108, says that "civilization is placed to-day with the necessity of devising forms of Government which will weld into one composite whole, the efficiency of totalitarian control and planning in the economic field with the cultural and political freedom that democracy alone can provide. To stress the unessential liberties, or to demand the continuance of privilege and the licence for a limited class in society in the circumstances of to-day, is to invite the rapid destruction of democracy". Mr. Cripps suggests that the House of Lords should be retained only for revisional legislation, and not as a check on the power of the commons in initiating social legislation. Essential liberties must be guaranteed, and unessentials should be curtailed in public interest. Liberty to hold opinions, liberty to influence opinions, liberty to register opinions and economic liberty are important. Unemployment must be made a state responsibility, and employment insurance and poor law must be strengthened. Unemployment benefits, national health insurance, compulsory education, etc., are to be provided by the State. Workmen's combines should be organised and regulated by proper safeguards. The significance of these statements are of absorbing interest, and of real practical value to conditions prevailing in India, and the proposals of the Planning Commission may as well adopt the suggestions mentioned by Cripps. The observations of Sir Alexander Macven in his book on 'Towards Freedom' are worth noting on the aspects of distribution of wealth, and the need to preserve spiritual and religious liberty.

The American Constitution, has by judicial interpretation by the Supreme Court, extended the sphere of individual rights especially of workmen and labourers so as to be adjusted to the social and economic environments of the people. (See the Constitution and social economic changes by Rottschafer.) An enumeration under Article 10, that enumeration in the Constitution of certain fundamental rights shall not be construed to deny or disparage others retained by the people, is wide enough to embrace various rights to work, to proper wages, to be protected from disease, etc., which workmen can always agitate for (*see* 'Regulation of Public Utilities' by M. Clay). America, particularly United States, has raised the standard of living of its people by its high level of industrialisation and it may take centuries

for other countries with depleted financial resources like India to achieve in the course of 25 or 50 years what America has achieved after 150 years of strenuous planning and execution. But even America to-day stands in danger of losing its hold on its people if it does not provide for adequate translation of the people's wishes into Governmental policies (see Browder 'Communism in the United States'). Besides, in the interests of international peace and security, American standard of judging individual liberty must have a slight shift towards the recognition of the needs of an international society suffering from economic want and poverty. "In fact it would be necessary to raise the standard of living of countries like India and China if the surplus productive capacity of the United States is to be absorbed. With a higher standard of living and an increased purchasing power, the vast millions of India and China would be the potential customers of the surplus production of American factories. It is in the collective security of all nations of the world that we must seek the economic security of highly industrialised countries like the United States. It is to be expected that in the post-war reconstruction of the world there would be a rational system of distribution and consumption, so that the world will not again see the distressing phenomenon of poverty in the midst of plenty". (Sir R. K. Shanmugham Chetty's speeches on India and America, page 49). There must be a compromise between pure individualism and rank communism, the two conflicting idealogies of to-day represented by America and Russia respectively. A compromise based on social justice which the Hon'ble Pandit Jawaharlal Nehru himself visualises in his autobiography (at page 594) is what is now called as democratic socialism or a just balance between capital and labour, between wealth and poverty, a balance which the early constitutions of the 20th century really aspired for, but which in the result was upset by the development of dictatorship based on one party rule. Thomas Wilson in "Modern Capitalism and Economic Progress" (pages 123-132) says "Democratic socialism does not demand expropriation but promises fair compensation. The private ownership and control of capital is one of the foundations of democracy. If the ownership is found to be too much concentrated, steps should be taken to mitigate the evil and encourage the growth of smaller properties. This may be done by taxation like death duties. Levelling down will help but there must be a building up from below and the latter is more important of the two methods".

Now it has been given to India to give the lead to the rest of the world by enacting the constitution of the sovereign Republican Democracy of India in 1947, based on justice, economic and social, wherein there shall be equality before the law for all its citizens, and equality of status and equality of opportunity for all to earn their livelihood. The Indian democracy is a synthesis of principles drawn from both political democracies like America, England, France, Australia, Canada, etc., as well as economic or social democracies like the early 20th century Germany and Poland and the latter Russian and Irish constitutions. The constitution of 1935 itself provided for certain fundamental rights under sections 298 and 299. It was Pandit Jawaharlal Nehru that took up the question of fundamental rights and safeguards on the lines of postwar Poland, Esthonia, Zeckoslovakia, Latvia and other states of Europe. The Simon Commission rejected that idea. The first Round Table Conference took up the question of minorities. The Viceroy's consultative committee in 1932 considered a long list of fundamental rights. The whole matter was taken up in the 3rd Round Table Conference. Mahatma Gandhi declared in one of his speeches in the Round Table Conference in London in 1931 that the interest of the dumb millions alone was the supreme motive power of the Congress, and that the Congress will sacrifice every interest for the sake of the interest of these dumb millions. The Joint Select Committee on the Indian Constitution discarded the idea of implementing 'Fundamental Rights'. They agreed with Sir John Simon in discarding it that the most effective method of ensuring the destruction of fundamental rights was, according to them, to include a declaration of its existence in a constitutional document. They were not ready either to amend the preamble to the constitution of 1919 wherein responsible government is to be achieved only by stages. The 3rd Round Table Conference went into the question

and finally only a few rights were incorporated into the scheme of the Act. The English Magna Carta, the Petition of Right, the American Bill of Rights, etc., influenced the growth of fundamental rights in England and India (Refer International Law and Human Rights, page 127, by Laoderpatch). The problem of economic democracy was recognised in India by the Karachi Congress as a supreme necessity, and as a measure of social advance.

Now it was at the same time that the United Nations Organisation in 1947 constituted the Human Rights Commission for preparing a universal declaration of human rights, and these rights were passed unanimously by the General Assembly of the United Nations in December 1948 in Paris. The Charter of the United Nations and the articles of the International Labour Organisation, Philadelphia, reassured social rights and socialism of material resources to all nations.

The Indian Constitution has recognised the sanctity and validity of these recommendations and in Chapter IV of the Constitution styled as ' Directive Principles of State Policy ' has enumerated several principles with a view to effect democratic socialism in the Indian Constitution, by virtue of social and economic advancement of the masses and particularly in Article 51, the Constitution empowers State Legislatures to pass laws for the promotion of international peace and security.

Part III defines and guarantees protection of individual liberty restricted in its operation by public interest. Part IV defines and guarantees in an indirect way the same liberties to the individual considered as a part of the society or the community, and by implication enables State Legislatures to pass measures of social and economic reform without prejudice to the rights mentioned in Part III. Part IV is really the impact of socialistic forces on Part III which is political democracy. The result of their conjoint constitutional effect as a result of progressive interpretation by the judiciary will in due course establish democratic socialism in India. That Part IV is subservient to Part III is laid down by the Supreme Court Judgment in *State of Madras* v. *Champakam Durairajan*, (1951) 1 M.L.J. 621, but at the same time it is a matter of profound satisfaction that the judgment of the Supreme Court in 1952 S.C.R. 889, *Behar Zamindari Case* contains observations that goes to show that law after all is an instrument of social progress. *Vide* (Sir Alladi Krishnaswami Aiyar's speech in the Andhra University): " The flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law ". *Vide* observations of Justice Mathews of American Supreme Court in *Huntado* v. *California*, (1884) 110 U.S. 576, Re, Due Process Clause, of the Fourteenth Amendment. The recent judgment in the Supreme Court, Delhi, reported in *The Hindu*, on 22nd February, called the ' Bihar Sathi Lands Restoration Act Appeal ' lays down the fundamental right of the citizen to have equality before the law, a principle well recognised in all progressive forms of government. Following upon the abolition of feudal systems of land revenue like zamindari and jagirdari, what is to be the next step in Indian land policy ?

Besides the observations made by me in regard to the applicability of principles of continental constitutions to the Indian problem, I might also suggest that an Economic Development Council financed by an Agricultural Finance Corporation in India is really necessary as a further step in the direction of solving social and economic reform schemes. The Council may be a Parliamentary Committee composed of all the members of the parties who might initiate legislations if their scheme is finally approved by the Supreme Court, on a reference for opinion by the President under Art. 143 of the Constitution as being consistent with fundamental rights of the citizen in a progressive society, and such legislation may be passed in Parliament as a reasonable restriction of fundamental rights. Refer Sir M. Visveswarayya's work on ' Planned Economy of India '.

There is large scope for development and practice of social and economic development in India under the leadership of eminent statesmen like the Hon'ble Pandit Jawaharlal Nehru, Prime Minister of India, and the recent report of the Planning Commission has made a sincere attempt to solve the economic problems

of the country under the Five-Year Plan. It is also gratifying to note that the plan is capable of modifications to suit growing needs, and suitable amendments may be made for the purpose of doing economic justice. The caution given by Mr. Attlee, Prime Minister of the former Labour Ministry in England, that in India with a majority of poverty-stricken people, democratic socialism may fall, and end in communism, should be remembered and sufficient safeguards should be imposed in introducing economic reforms in order to prevent this fall. A few details of the plan in my opinion as already expressed, may be modified to suit, the personal and property law of the Hindu community, and certain suggestions which advise caution in immediate implementation of them, have alone to be considered, but what strikes me most, and to which frank expression must be given, is the magnitude of the great step towards social and economic progress in India on the goal towards the realisation of democratic socialism which has been made by the strenuous work in drawing up the five-year plan, which promises to increase national income and per capita income in India doublefold, in the course of 25 years. Two things stand out for special mention, in the interests of the stability, through rigidity of the constitution, one is, the recognition of middle class standard of living as one to be guaranteed by the constitution as in the continental constitutions, and secondly, the need to stress on adequate rents and adequate compensation for expropriation of property, whether purchased by Government directly or by the tenant by legal provision. "Basis of valuation must be fair valuation of property used for convenience of public, and there must be establishment of an irreducible minimum beyond which legislators and committees must not go in the exercise of their descretion to fix fair and reasonable rates", vide *Smyth* v. *Ames*[1]. The process of industrialisation of the country will naturally raise the level of the lower classes to the middle class. An equal distribution of land may not be possible either considering shortage of landed wealth in proportion to population or efficiency of an economic holding of all absorbing interest, a fact which has been well recognised by the Planning Commission in its recent report. But lands of the upper denomination may be acquired on compensation in order to distribute them to really needy poor and unemployed landless people. Radhakamal Mukerjee in his work on 'Economic Problem of Modern India', page 240, suggests example of Denmark for copying the principle of land purchase by tenants. See also 'The Northern Countries in the World Economy' published by the Delegates in 1933.

Millions of acres of virgin land have already yielded to the plough, bringing large produce, on being supplied with water from the newly constructed irrigation schemes and the schemes now proposed to be financed under the Five-year plan, will open out further possibilities of fresh lands being brought under cultivation thus solving the acute food problem in the country permanently.

The world socialist Conference has been organised as an effective weapon for combating communism, and surely India will give the lead to the rest of the world in proclaiming its gospels of non-violence and by implementing its constitutional provisions in a progressive way, in order to take in judicial precedents, customs, conventions, etc., which will conduce to social progress in the Indian Society. Well may we hope that India will declare by the constitutional guarantees to the Indian Society and to the world, that its constitution has been adopted to suit progressive ideas whereby every individual, whether rich or poor, master or servant, capitalist or labourer, will be treated as a 'Partner in a joint enterprise', where society will not treat him as a mere instrument to its ends, but as a living organism shaping and co-operating in the working of the machinery of Government. This is the key note of the preamble 'Fraternity assuring the dignity of the individual and the unity of the nation' and may we add, the unity of the nations too.

The Hindu Ideal of Dharma is comprised in the following words :

"मातृवत् परदारेषु परद्रव्येषु लोष्टवत् ।
आत्मवत्सर्वभूतेषु यःपश्यति स पण्डितः ॥

1. (1898) 169 U.S. 469.

i.e., Look upon other's wife as your mother,

Look upon other's property as a piece of stone (*i.e.*, don't claim it as of right),

Look upon others (all the rest of the world), their interests as your own (*i.e.*, duty to render help to others in suffering).

He who follows this precept, is the really learned man ! In other words, it is the Hindu fundamental obligation to relieve the poor, and make necessary sacrifies for the same. May we hope that the great saint like Acharya Vinova Bhave, in canvassing for gifts of land, to be in turn gifted to landless unemployed labourers, be not only successful by getting proper response from rich landlords, but that many other charitable institutions may be built for the purpose of succouring the helpless, and hunger-stricken peasants, workers, and labourers in India !

"HIGH COURT FOR THE ANDHRA STATE."

By

S. VAIDYANATHAN, B.A., B.L., *Advocate, Supreme Court of India and High Court, Madras.*

On the establishment of the Andhra State by Act of Parliament under Article 3, Schedule I of the Constitution will be amended by adding 'Andhra' to Part A of the said Schedule. The question arises, what is the position of the Madras High Court, *vis a vis*, the newly established Andhra State ? Under Article 214, which lays down that there shall be a High Court for each State ('State' here means a Part A State — *vide* Article 152), the Madras High Court will continue to be the High Court for the residuary State of Madras. As regards Andhra, two views are possible. One view is that immediately on the establishment of the Andhra State as a Part A State the jurisdiction of the Madras High Court is automatically excluded over the territory of the new State, and a separate High Court for the Andhra State will have to be established by supplemental and consequential Parliamentary legislation as provided by Article 4 and such legislation should be brought into operation simultaneously with the Act creating the new State under Article 3. If for some reason it is found neither feasible nor expedient to adopt this course, the alternative is for Parliament to make a law under clause (*a*) of Article 230 read with item No. 79 of List I of Schedule VII extending the jurisdiction of the High Court of Madras to the Andhra State. If neither of these courses is adopted, there will be violation of the mandatory provisions of Article 214.

According to the other view, the existing Madras High Court will be the High Court for the Andhra State also right from its birth as a Part A State, as the mere creation of the new State does not by itself without express Parliamentary legislation in that behalf, operate to exclude the jurisdiction of the High Court of Madras over the Andhra State (*see also* Article 225). In this view no legislation under clause (*a*) of Article 230 is required to confer on the Madras High Court "an extended jurisdiction" over the Andhra State. If, however, it is intended to have a separate High Court for Andhra with its principal seat in the new State itself, it is not only necessary according to this view to establish by legislation a High Court for Andhra within that State, but it is also necessary for Parliament to make a law under clause (*b*) of Article 230 read with item 79 of List I of Schedule VII, excluding the jurisdiction of the Madras High Court over the Andhra State.

It is submitted that having regard to the spirit and scheme of the Constitution, the first of the two views discussed above appears to be the sounder one.

SUMMARY OF ENGLISH CASES.

MANWARING *v.* BILLINGTON, (1952) 2 All E.R. 747 (C.A.).

Factories Act—Statutory duty of employer—If could be delegated—Delegation—What amounts to—Disobedience of express instructions of employer—Injury to workman—Liability of employer.

There is a very great distinction between the instructions by an employer to a workman as to how a particular task is to be performed and the delegation of a statutory duty imposed on the employer. To be a delegation of a statutory duty it must be made clear that it is a statutory duty that is being delegated and that what is being said is not mere instruction common to all workmen as to how the workmen should carry out the work.

An employer could not be expected personally to fix every ladder used by his men during painting operations, nor personally to supervise every operation, in the course of which the use of ladders was necessary. If he gave clear and adequate directions as to lashing and securing the ladders, he was doing what a reasonable employer was entitled to do.

WHITELEY *v.* WILSON, (1952) 2 All E.R. 940 (C.A.).

Rent Restriction Act, 1939—*Premises—Dwelling house or shop—How determined.*

Whether a structure is a dwelling house, or is an office, or constitutes other business premises, is a question of fact in the particular case to be determined on the evidence and that in marginal cases the Court may properly consider whether the business use or the business occupation does not so far predominate as to exclude from material significance the fact that there may be some part of the premises which can be said to be used for residential purposes.

The question in cases where the subject-matter of the tenancy is one building used partly as a dwelling house and partly as a shop, and no purpose is specified in the tenancy agreement, is whether the building should in a broad sense be regarded on the one hand, as a dwelling house which is partly or even substantially used as a shop, or, on the other hand, as a shop which is used in part for residential purposes.

BARTHOLOMEW *v.* BARTHOLOMEW, (1952) 2 All E.R. 1035 (C.A.).

Divorce—Husband and wife—Desertion—Constructive desertion—What is—When a ground of divorce.

To establish a right to a decree for divorce on the ground of constructive desertion it is necessary, it has been said time and again, to prove an actual intention to bring the matrimonial consortium to an end. Although the intention can be inferred from the circumstances, no such inference can be drawn unless the conduct relied on is of a grave and convincing character, equivalent to driving the other spouse away.

The fact that a wife is lazy and is dirty is not of necessity something which shows she is determined to get rid of her husband. She may be dirty because she is lazy or lacks energy.

BOOK REVIEWS.

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, published by Sanyal & Company, 1-1A, College Square (East), Calcutta 12. Price Rs. 40.

This book is a verbatim reprint of the dissenting opinion of Justice R. B. Pal of India who was one of the Members of the Bench that was constituted to try the Japanese War Crimes after the World War II. It is not the province of a reviewer to go into the merits of the opinions expressed by the learned Judge or the Majority of the Board. Suffice to say the judgment now placed before the public in book form is a masterpiece of logic and constitutes an interesting and useful reading.

After the end of the World War II the victorious Allied Powers constituted a International Military Tribunal for the Far East for the trial of Japanese leaders who were charged with crimes against peace and humanity. The entire set-up, procedure, evidence, etc., during the trial appears to have gone very much against the trained judicial mind of the learned Judge. The learned Judge in his dissenting judgment in the *United States of America and other Allied Powers v. Arakisadao and others*, has held that every one of the accused must be found *not* guilty of the charges and should be acquitted. According to the learned Judge the entire trial was gone through by the victorious Nations to attain a political end under cover of judicial appearance.

The book makes an excellent reading and for its exposition of the first principles of law and procedure in a new field, it stands unequalled. Students of International Law of War and Peace will find the book very useful.

The book is well got up and the printing and binding and the quality of paper is excellent, quite in keeping with the subject it deals with, which is of lasting interest. A number of interesting photographic Art plates adds to the reading value of the book.

OUTLINES OF INDIAN LEGAL HISTORY by M. P. Jain, LL.M., Lecturer, Faculty of Law, University of Delhi. Price Rs. 12. Dhanwantri Medical and Law Book House, 152, Elgin Road, Delhi, 6.

Ths history of any system of Jurisprudence is not without its attraction to the practising lawyer. However, its real utilitarian importance is only for the students. This book is obviously intended to meet the requirements of the students of the LL.B. and LL.M. classes of the Delhi University. Barring Cowell's 'History of Courts and Legislative Authorities in India' there is no book on the subject which the students could use. The author of this book is well equipped for the task he has achieved as he has been closely associated with the teaching of the subject in the University. The book will be found useful by students in other Universities too where the course of study comprises the subject of "Legal History."

The author has taken considerable pains in collecting a great volume of matter covering a large period and presenting it in a short compass with a precision and analysis that makes the book readable and useful. The later chapters relating to recent developments in the administration of justice are very instructive.

Digest of Decisions of the Labour Appellate Tribunal of India compiled by N. K. Khare and N. N. Akruwala with a Foreword by Sri K. P. Lakshmana Rao, President, Bombay Bench, Labour Appellate Tribunal. Price Rs. 10, Published by Indian Legal Publications, Ahmedabad.

A book of 115 pages has over 30 pages allotted for its Index and Table of Cases. The digesting of cases could have been more analytical and exhaustive. As it is, the reader is likely to get mixed in the Statute-heading and subject-heading. The subject-heading should be in bold types and the catchwords in italics to facilitate easy reference. Being first of its attempt in a new sphere of case digesting there is considerable scope for improvement. As a book of reference to those interested in labour problems the digest will be of great help. Though the decisions of these Tribunals are not precedents in the strict sense known to lawyers and jurists, still much of the law gets clarified in these decisions and their growing importance cannot be overlooked. A Digest of these decisions is a welcome effort and will receive much support from the public for whom they are intended.

The Employees' State Insurance Act (XXXIV of 1948) (Labour Code, Vol. IV) Edited by N. M. Shah, LL.B., Pleader, 1953. Price Rs. 7-8-0. Published by Chandrakant Chimanlal Vora, Law Publishers, Ahmedabad.

This small book with its bold printing, heavy binding and gold letters has unnecessarily increased its price. It reproduces the text of the Employees' State Insurance Act with the Central Rules and Regulations including the recent Provident Fund Regulations. Some State Rules of Bombay and Uttar Pradesh are also added. This little book purports to be the fourth volume of a Labour Code, three volumes of which have already been published and two more are in the press. More volumes are in the scheme of publication. Obviously, each Act relating to Labour Legislation is sought to be published as one volume. If that is so the need is all the greater to bring out the volumes at a lower price so that the entire Code will be within the reach of all. At the rates till now announced, the cost of the whole code when complete will be prohibitive.

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NOTES OF INDIAN CASES.

SATYAVATHI *v.* STATE OF MADRAS, (1952) 1 M.L.J. 41.

Article 31 of the Constitution of India provides that no person shall be deprived of his property save by authority of law and that no property, movable or immovable, shall be taken possession of or acquired for public purposes without payment of compensation. Whether the acquisition of land for providing house-sites for Harijans would be a "public purpose" within the meaning of Article 31 had to be considered in the above case. The fifth Amendment to the Constitution of the United States includes a provision: "Nor shall private property be taken for public use, without just compensation." Likewise, Article 29 of the Japanese Constitution, 1946, says: "Private property may be taken for public use upon just compensation therefor." In India itself section 299 of the Government of India Act, 1935, had provided: "Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land . . . . . unless the law provides for the payment of compensation for the property acquired." There is no definition, however, of 'public purpose' in any of our legislative enactments to afford us a clue to the meaning of the term, save one in the Land Acquisition Act, which is only a partially inclusive and not an exhaustive definition. Section 3 (*f*) of that Act provides that the expression "'public purpose' includes the provision of village sites in districts in which the Provincial Government shall have declared by notification in the Official Gazette that it is customary for the Government to make such provision, and section 40 (1) (*b*) would seem to equate a 'public purpose' with 'some work likely to prove useful to the public'." It is true that general definitions are to be avoided where the avoidance is possible, *Hamabhai Framjee* v. *Secretary of State for India*[1]. What should be the test of a 'public purpose' will, however, have to be indicated. It is here that the decisions of the Supreme Court of America construing the term 'public use' in the American Constitution become valuable. The power to take private property for public uses is generally called the 'right of eminent domain' and belongs to every independent Government as an incident of sovereignty and requires no constitutional recognition, *United States* v. *Jones*[2]. [The doctrine is an offspring of political necessity, and is based upon an implied reservation by Government that private property acquired by its citizens under its protection may be taken or its use controlled for public benefit irrespective of the wishes of the owner]. 'Public use' includes the appropriation of lands or other property by the State for its own uses in order to enable it to perform its proper functions, *Kohl* v. *United States*[3], *Cherokee Nation* v. *Southern Kansas Railway Co.*,[4]. It will not include the

1. (1914) I.L.R. 39 Bom. 279, 291.
2. (1883) 109 U.S. 513, 518.
3. (1876) 91 U.S. 367.
4. (1890) 135 U.S. 641, 656.

taking by a State of the private property of one person without the owner's consent for the private use of another for that will not be due process of law and will be a violation of the 14th Article of Amendment of the Constitution of the United States, *Missouri Pacific Railway Co.*, v. *Nebraska, ex. rel. Board of Transportation*[1]. What is a 'public use' frequently and largely depends on the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned and it is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. In that view it was held that to irrigate lands and bring into possible cultivation large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest not confined to the landowners or even to any one section of the State, *Fallbrook Irrigation District* v. *Bradley*[2]. So also lands taken in a city for public park or square, whether advantageous to the public for recreation, help or business can be deemed to be for a public purpose, *Shoemaker* v. *United States*[3]. Even the acquisition of land to provide water for one individual from a stream in which he has an interest, to irrigate his land which otherwise would remain absolutely valueless, will be deemed in certain circumstances to be for 'public use.' In *Clark* v. *Nash*[4], Peckham, J., observed : "This Court has stated that what is a public use may frequently and largely depend upon the facts surrounding the object . . . . It is true that in the *Fallbrook case*[2], the question was whether the use of the water was a public use when a corporation sought to take land by condemnation under a state statute, for the purpose of making reservoirs and digging ditches to supply landowners with the water the company proposed to obtain and save for such purpose. This Court held that such use was public. The case did not directly involve the right of a single individual to condemn land under a statute providing for that condemnation. We are, however, disposed to agree with the Utah Court with regard to the validity of the state statute which provides under the circumstances stated in the act for the condemnation of the land of one individual for the purpose of allowing aonther individual to obtain water from a stream in which he has an interest to irrigate his land which otherwise would remain absolutely valueless." It would thus seem that the range of 'public use' which is very elastic, and must depend on the circumstances of each case, will include taking of land for performance of functions of state and it is not necessary that the entire community or even any considerable portion of it should directly enjoy or participate in any improvement. Even benefit immediately to one individual may be 'public use' in special circumstances. In *Moses* v. *Marland*[5], it was held by Bruce J., that a place used for a public purpose means not a place used in the public interest but a place to which the public can demand admission or to which they are invited to come. But that was with reference to the words "any other public purpose" used in the London Building Act, 1894, and cannot help in the context of the Indian Constitution. In *Hamabhai Framjee* v. *Secretary of State for India*,[6], there was a resumption of inam lands by Government for building residences for its officers to be let to them on rent. On a question whether the acquisition was one for a public purpose, Batchelor, J., observed : "It is enough to say that, in my opinion, whatever else it may mean (it) must include a 'purpose,' that is an object or aim in which the general interest of the community, as opposed to the particular interest of indiv-duals is directly and vitally concerned." In affirming the conclusions of the High Court, the Judicial Committee, on appeal said *inter alia* : "The argument of the appellants is really rested upon the view that there cannot be a public purpose in taking land if that land when taken is not in some way or other made availabe to the public at large. Their Lordships do not agree with this view." Part XVI of the Constitution contains special provisions for safeguarding and promoting the rights of Scheduled Castes and Tribes. In the Fifth Part of the Schedule to the Constitution (Scheduled Castes) Order, 1950, made by the President in the

1. (1896) 164 U.S. 403.
2. (1896) 164 U.S. 112.
3. (1892) 147 U.S. 282.
4. (1904) 198 U.S. 361, 369.
5. (1901) 1 K.B. 668.
6. (1914) I.L.R. 39 Bom. 279.

exercise of the powers conferred by clause (1) of Article 341 of the Constitution of India, the Adi-Andhras are included in the list of Scheduled Castes. The advancement and development of the interests of that community are thus an object of special concern by Government as forming part of the policy underlying the Constitution. Acquisition of land for providing residential sites for members of Adi-Andhra community would be as much a public purpose as the acquisition of land for providing residences for Government servants was held to be in *Hamabhai Framjee's case*[1]. The decision in the instant case that such acquisition is not opposed to Article 32 of the Constitution is thus in accord with authority.

THAMSI GOUNDAN *v.* KANNI AMMAL, (1952) 1 M.L.J. 68.

The question raised in this case was whether section 488, Criminal Procedure Code, is repugnant to Article 14 of the Constitution by reason of its provision for the award of maintenance to wives deserted by their husbands while there is no similar provision in favour of husbands deserted by their wives. Article 14 of the Constitution provides : "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." The phrase "equality before the law" has been explained by Professor Jennings to mean that "among equals the law should be equal and should be equally administered, that like should be treated alike."[2] Section 40 (1) of the Constitution of Eire expressly declares that equality before the law "shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical or moral, and of social function." Article 14 corresponds to the 'equal protection clause' of the 14th Amendment to the Constitution of the United States of America which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws." The range and sweep of the phrase "equal protection of the laws" are vividly set forth by Professor Willis who observed : "It forbids class legislation but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and the liabilities imposed. The inhibition of the amendment . . . . . was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. It does not take from the states the power to classify . . . . . but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis."[2] In *Yick Wo* v. *Hopkins*[3], it was pointed out that equal protection of laws is a pledge of the protection of equal laws. It was stated in *Southern Railway Company* v. *Greene*[4], that this means subjection to equal laws applying alike to all in the same situation. In view of the foregoing, while recognising that Article 14 of the Constitution provides one of the most valuable and important guarantees in the Constitution which should not be allowed to be whittled down, it was at the same time recognised that there can be classification which should, however, never be arbitrary but must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made, see *Charanjit Lal Chowdhury* v. *The Union of India*[5], *Om*

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1. (1914) I.L.R. 39 Bom. 279.
2. Constitutional Law, 1st Edn., p. 579.
3. (1886) 118 U.S. 356, 369.
4. (1908) 216 U.S. 400, 412.
5. (1951) S.C.J. 29, 34, 53.

Parkash v. *The State*[1], *Sheoshankar* v. *The State of Madhya Pradesh*[2], *Asiatic Engineering Company* v. *Achhuram*[3], *S. B. Trading Company* v. *Shyamlal Ramchandra*[4]. It has been held that a classification is reasonable if it rests on differences pertinent to the subject in respect of which such classification is made, *Power Manufacturing Company* v. *Saunders*[5]. It cannot be disputed that women as a class are weaker than men. It is familiar knowledge that women still labour under legal disabilities and discrimination in the domain of property law and in other directions. It is also one of the policies underlying the Constitution to afford special protection for women. The third clause in Article 15 declares that the State shall always be competent to make special provision for women and children. It is thus clear that both on principle and on authority the provision in section 488, Criminal Procedure Code, for the award of maintenance to wives abandoned or deserted by their husbands does not in any way contravene Article 14 of the Constitution.

ARAVAMUDHA IYENGAR *v.* RAMASWAMI BHATTAR, (1952) 1 M.L.J. 251.

In so far as this decision holds that a person, male or female, who has not attained the age of majority in Hindu Law, *i.e.*, 16 years cannot validly adopt, it is no mere copybook decision but one laying down a definite test in place of one dependent on the facts of each case, namely, the attainment of the age of discretion by the adopter. Certain dicta in the judgment, relating to the limits of a widow's capacity to adopt, call for critical examination. In reviewing the principles laid down by the Judicial Committee in *Amarendra* v. *Sanatan Singh*[6], and their effect on what had been stated in *Madana Mohan Deo* v. *Purushothama Deo*[7], after stating—— " The full legal capacity to continue the line means continuance of the line in one of two ways, *i.e.*, either by leaving a natural or adopted son, or a widow capable of bringing into existence a son by adoption. The test is to find out whether these conditions existed at the time of the son's death." Satyanarayana Rao, J., went on to add : " If they did not exist, the power did not terminate. If they existed the power came to an end and *in certain circumstances*, e.g., *if the son's widow dies without making an adoption, the mother's power may be revived.* If the object of adoption is the religious one of perpetuating the line with a view to make a permanent arrangement for the administration of the spiritual wants of the deceased, the object is not achieved when the continuance of the line came to a standstill. There must be some power somewhere to continue the line, and, *if the person lower down dies without providing for the continuance of the line, the power of the person higher up revives and continues*". (italics ours). The theory of the revival of the power of the person higher up when the continuance of the line comes to a standstill postulated in the remarks italicised above does not receive any countenance from and in fact runs against the observations of the Privy Council in *Amarendra's case*[6]. The limiting principle formulated by Chandavarkar, J., in *Ramakrishna* v. *Shama Rao*[8], was : " Where a Hindu dies leaving a widow and a son, and that son dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and *can never afterwards be revived.*" The last part of the observation expressly states that the power perishes and repudiates categorically the theory of the revival of the power under any circumstances whatsoever. The principle so stated by Chandavarkar, J., was in terms approved by the Privy Council in *Madana Mohana Deo's case*[7]. There Lord Haldane observed : " Their Lordships are in agreement with the principle laid down in the judgment of the Full Court of Bombay as delivered by the learned Judge, and they are of opinion, on the facts of the present case, the principle must be taken as applying so as to have brought the authority to adopt conferred on Adi-

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1. A.I.R. 1951 Punjab 93.
2. A.I.R. 1951 Nag. 58.
3. A.I.R. 1951 All. 746 (F.B.).
4. A.I.R. 1951 Cal. 539.
5. 274 U.S. 490.
6. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
7. (1918) 35 M.L.J. 138 : L.R. 45 I.A. 156 ; I.L.R. 41 Mad. 855 (P.C.).
8. (1902) I.L.R. 26 Bom. 526.

konda's widow to an end when Brojo, the son she originally adopted, died after attaining full legal capacity to continue the line either by the birth of a natural born son or by adoption to him of a son by his own widow." It is noteworthy that the power of Adikonda's widow is spoken of as having come to an 'end.' In *Amarendra's case*[1], itself, explaining the phrase "full legal capactity" used by Lord Haldane in his judgment in the earlier case, Sir George Lowndes said : "Their Lordships think that the words "full legal capacity" cannot be dissociated from the r st of the passage cited, and that they cannot be taken as indicating a particular moment in the son's life when the mother's power is extinguished. The qualification that follows then shows that the continuance referred to is a continuance in one of two defined ways, either by the birth of a natural son or by the adoption of a son to him by his own widow and the test is to be whether these conditions existed at the time of the son's death. The passage under consideration is. . . . . clearly intended to be a restatement in a more critical form of the conclusion to which the Bombay High Court had come and which was affirmed in the same sentence only a few lines before, *viz.*, that the power of adoption would be extinguished on the son's death by the survival of either a grandson or the son's widow." Be it noted that the Privy Council once again talks of the power being "extinguished" and once again emphasises that the critical time is the time of the son's death with reference to which only and not with reference to subsequent events the existence of the power falls to be determined. The only reservation made was thus stated : "Whether in order to bring this principle into play the son's widow should herself be clothed with the power of adoption is left open and it is not necessary for their Lordships to consider this in the present case as Bibhudendra died unmarried." On these authorities, it is clear that where at the time of son's death there was a son's widow who could at some time have adopted, the power of the mother comes to an end and is extinguished beyond the possibility of revival. Whether the son's widow subsequently fails to adopt or refuses to adopt or dies without adopting or remarries are events which cannot be relevant to the purpose. For, as recognised by the learned Judge himself in the instant case, the material point of time is the time of the son's death. In *Ramchandra* v. *Muralidhar*[2] one *R* died leaving a widow *G* and a son *S*. Sometime later the son died leaving a widow aged about 11 or 12 years. The latter could not have adopted on her husband's death as she had not then attained her years of discretion. Nevertheless it was held that adoption by *G* will be void. The learned Judges took the view that since at the time of the son's death there was his widow who can adopt to him at some time though not immediately the power of R's widow had been totally extinguished. In *Chanbasappa* v. *Madivalappa*[3], a person had died leaving his wife and an adopted son. Subsequently the latter died leaving two daughters but no widow. It was held that, in the circumstances, the 'power of the adoptive mother of the deceased to adopt again remained unaffected. In Nagpur, the theory of revival has found countenance in cases where the daughter-in-law remarried and thereafter the mother-in-law adopted to her husband, *Bapuji Ramji* v. *Gangaram Madhorao*[4], *Govinda* v. *Shenpad*[5]. In the first of these cases, Stone, C.J., observed : "The real difficulty lies in the question : Does the power revive if the son's widow dies or otherwise becomes incapable of adopting before she (*i.e.*, the son's widow) adopts? We fully bear in mind the warning given by the Judicial Committee in *Raghunadha* v. *Brojo Kishore*[6], that it is the duty of the Court to keep the power (to adopt) strictly within the limits which the law has assigned to it. We contrast this with the warning given in *Amarendra* v. *Sanatan Singh*[1] : "great caution should be observed in shutting the door upon any authorised adoption by the widow of a sonless man." The difficulty is to find the boundary line. In *Vijaisinghji* v. *Shivasangji*[7] the Judicial Committee observe : "In the present case the natural son *B* with his wife *D* having

1. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
2. A.I.R. 1938 Bom. 20.
3. I.L.R. (1937) Bom. 642.
4. I.L.R. (1941) Nag. 178.
5. I.L.R. (1949) Nag. 416.
6. (1876) L.R. 3 I.A. 164 : I.L.R. 1 Mad. 69 (P.C.).
7. (1935) L.R. 62 I.A. 161 : I.L.R. 59 Bom. 360 (P.C.).

ceased to exist for the purpose of continuing the line in the Ahima family, his mother *C* was entitled to make an adoption to secure that object." "It is, of course, true that *D* there never became a widow and so never attracted the idea that once a widow the grandwidow's power is for ever gone. Can we, however, have a rule which says that if *B* and *D* die together *C's* power which was suspended while either of them lived (was interposed), revives, but if *B* dies on Monday and *D* on Tuesday (a thing which frequently happens in time of plague) *C's* power, which was ended by *D's* becoming a widow for a day does not revive? The Hindu Law has anomalies but this anomaly would be founded entirely on Judge-made difficulties."[1] The Court held that the grand-widow's power of adoption stood revived if the son's widow contracted a remarriage without having adopted to her deceased husband. The Nagpur view was considered by the Bombay High Court in *Shamrao* v. *Bhimrao*[2] and Chagla, C.J., observed: "In order to determine whether a widow has the power to adopt or not on the death of her son the test that has got to be applied is, has that son left a grandson or has that son left a widow. If either of the contingencies is present, then the widow has no longer the power to adopt." Excepting thus for the support afforded by the Nagpur decisions there is practically no warrant for the theory of revival of a widow's power of adoption and in fact the theory is opposed to the law as set out by the Judicial Committee in *Amarendra's case*[3].

PERAMANAYAKAM PILLAI *v.* SIVARAMAN, (1952) 1 M.L.J. 308 (F.B.).

This is a Full Bench decision of importance concerning the rights of a purchaser from a member of a Mitakshara coparcenary. The decisions on the matter reveal different pulls. In legal theory, the alienee steps into the shoes of the alienor and takes the interest conveyed subject to the same limitations and conditions as the alienor. Except through and in the right of the alienor he cannot have any claims against the joint family. The working out of the alienee's equity has, however, caused not a little embarrassment in the logic of the law which had to be gathered from a bewildering array of decisions not all of them harmonious or easy to harmonise. This aspect of the matter was vividly put by the Judges in the instant case. Viswanatha Sastry, J., observed: "the touching refrain of the respondent's argument was 'overrule me if you please, but at least say something logical and consistent with the Mitakshara doctrine'," and replied: "Bluntly, I say, it is not possible to find a logical solution of an illogical problem." The learned Judge recalled the observations of Farran, C.J., in *Gurlingappa* v. *Nandapa*[4]—"The position of the purchaser of the interests of a Hindu coparcener in part or the whole of a joint estate is very anomalous. It is impossible to work out his rights on an exact logical basis"—and the references by Lord Dunedin in *Brij Narain* v. *Mangal Prasad*[5] to the Hindu joint family law as "illogical" and "anomalous." Raghava Rao, J., felt: "True it is that consistency on abstract grounds of logic cannot always prevail in the realm of judge-made law. It may also be that as said by Lord Halsbury once, law is not a logical science. But if the dictum of the learned law lord cannot as appears from *Rangaswami Goundan* v. *Nachiappa Goundan*[6] avail as a source of consolation for presuming an illogical extension of principle in interpreting the existing case-law on a subject, it can hardly be doubted or disputed that only logical applications and extensions should stand encouraged and all illogical applications and extensions of legal principles should be discouraged."

A Full Bench decision of four Judges had held in *Rangaswami* v. *Krishnien*[7] that the share to be awarded to an alienee from a coparcener should be fixed with reference to the coparcenary at the time of the partition. But a Full Bench decision, again of four Judges, had later on in *Chinnu Pillai* v. *Kalimuthu Chetty*[8], declared

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1. I.L.R. (1941) Nag. 178 at 198.
2. I.L.R. (1949) Bom. 296.
3. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
4. (1896) I.L.R. 21 Bom. 797.
5. (1923) 46 M.L.J. 23 : L.R. 51 I.A. 129 : I.L.R. 46 All. 95 (P.C.).
6. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72 : I.L.R. 42 Mad. 523 (P.C.).
7. (1891) 1 M.L.J. 603 : I.L.R. 14 Mad. 408 (F.B.).
8. (1911) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).

that the share was to be computed as on the date of the alienation. In *Muthukumara Sthapathiar* v. *Sivanarayana*[1], Jackson, J., sitting with Mockett, J., sought to effect a reconciliation between the Mitakshara doctrine of absolute refusal of recognition of alienation of joint family property by a coparcener and the rule of equity recognising the right of a purchaser for value, by holding that the fractional share of an alienee from a coparcener stood fixed as on the date of the alienation but there was no hotchpot hooked to it, and that the properties in which the alienee was entitled to share were those existing at the time of the partition. But in *Dharma Rao* v. *Bapanayya*[2], it was ruled that the view in *Chinnu Pillai's case*[3], had become settled law and no question of reconciling it with the earlier Full Bench ruling could arise at all. It was felt by both Viswanatha Sastri and Raghava Rao, JJ., in the instant case, that that decision had not done justice to the nature of the issue involved. But while Viswanatha Sastri, J., would regard the authority of the decision of the Full Bench in *Chinnu Pillai's case*[3] as settled and the matter one of *stare decisis* though if the matter was *res integra* his inclination would be to take views which may be considered " heretical," Raghava Rao, J., was emphatic that there was really no question of *stare decisis*. While Viswanatha Sastri, J., remarked: " The respondent's advocate hopes that the ghost of *Rangaswami* v. *Krishnien*[4], which was buried 40 years ago may walk again, nay, he anticipates a flesh and blood resurrection. All that I say is that such miracles, if they happen, will reduce transactions affecting property to a mere gamble "—Raghava Rao, J., hoped that the conflict between the two Full Bench rulings is one which ought to be resloved in a proper manner in a case in which the question on which the conflict exists actually arises for determination in future, the terms of the reference to the Full Bench in the instant case not warranting the consideration of the question. Be that as it may, it falls to be noted that three learned Judges have taken the view that the decision in *Chinnu Pillai's case*[3], has become a matter of *stare decisis* and is no longer open to further consideration.

Another point which the instant case had to consider was whether in a coparcener's suit for recovery of his share in property alienated by another coparcener impugning the validity of the alienation, if it is found that a portion of the consideration had been applied for binding purposes, he can recover his share without paying his quota of the common burden as a condition precedent. In *Vadivelam* v. *Natesam*[5], the principle to be applied was formulated as follows : " According to accepted equitable principles, in the absence of anything appearing to the contrary, the consideration for the sale must be distributed over the whole of the property sold in proportion to the value of each part . . . . . . The valid portion of the consideration as well as the invalid portion must be distributed over each of the half shares of the plaintiff and Chinnappa respectively." In *Venkatapathi* v. *Papiah*[6], it was, however, observed, " In such a case the only equity that can be worked out in favour of the vendee would be to uphold the sale of the alienor's share and to allot the whole of the consideration as consideration for that share." A majority of the Full Bench have held in the instant case in favour of the former view, while Raghava Rao, J., thought that the latter view was the more acceptable.

ANNAGOUDA NATHGOUDA *v.* COURT OF WARDS, SATARA, (1952) 1 M.L.J. 414 (S. C.).

In this case the Superme Court decides a *vexata questio*. The conflict of judicial opinion which had existed as to the applicability of the provisions of the Hindu Law of Inheritance (Amendment) Act, of 1929 to cases of Stridhana succession is resolved and it is declared that the Act is inapplicable to ascertain the heirs to

1. (1932) 64 M.L.J. 66 : I.L.R. 56 Mad. 534.
2. (1941) 1 M.L.J. 15.
3. (1911) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
4. (1891) 1 M.L.J. 603 : I.L.R. 14 Mad. 408 (F.B.).
5. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
6. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824.

the stridhana property of a maiden. The preamble to the Act is quite clear that the object of the Act was to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate. Again section 1, clause 2 lays down expressly that the " Act applies only to persons who but for the passing of this Act would have been subject to the law of Mitakshara in respect of the provisions herein enacted, and it applies to such persons in respect only of the property of males not held in coparcenary and not disposed of by will." The Act thus operates only in regaard to the separate property of a Hindu male who dies inststate. That the propositus should be a male is a condition precedent. In *Sakuntalabai* v. *Court of Wards*[1], Stone, C.J., and Vivian Bose, J., held that where the subject of enquiry is not who is entitled to a male's estate the Act cannot apply. So the Act cannot be invoked in regard to succession to stridhana property. The Madras High Court took the same view in *Manda Mahalakshmamma* v. *Mantravadi Suryanarayana Sastri*,[2] and *Kuppuswami Asari* v. *Manickasari*[3]. In the latter case it was stated that the rule of succession to stridhana property laid down in the Mitakshara has not been in any way altered by Act II of 1929. In *Talukraj Kuer* v. *Bacha Kuer*[4], in dissenting from the rulings of the Lahore High Court on the point. Manohar Lall, J., observed : " I cannot understand how the succession to the property of a female could be governed by Act II of 1929 which distinctly states that it shall only apply to the succession to the property left by a male." A contrary view was taken in *Mt. Charjo* v. *Dinanath*[5], where it was held that in cases of succession to stridhana in default of heirs to a married woman including her husband it is the husband's heirs on that date that should take and therefore Act II of 1929 will apply. Tek Chand, J., observed : " It is quite true that the Act is very limited in scope. It, in terms, regulates succession only to the separate property of a Hindu male dying in intestacy. It does not purport to alter the law in respect of the devolution of other property or the property of a female . . . . The rule of succession to stridhana as laid down in the Mitakshara is that in the absence of the issue of the female holder, it devolves on her husband, and if he is dead, it descends in the same way as if it had belonged to the husband himself. To ascertain as to who the heirs of the husband are, we must *ex necessitate rei* refer to the law governing succession to the property of the husband in force at the time when succession opened out." A similar view was taken by the Bombay High Court in *Raghunandan* v. *Keshavrao*[6], where the father's sister's son was preferred to the paternal grandfather's brother's son's son as stridhana heir to the property of a maiden. The Lahore High Court followed its previous decision, in *Kehar Singh* v. *Attar Singh*[7]. The Allahabad High Court also followed that view in *Indar Pal Singh* v. *Mt. Humangi Devi*[8]. The Supreme Court has now disapproved of the latter view. It has held that where the enquiry is for the purpose of finding out who the successor to the estate of a female owner is, the operation of Act II of 1929 is excluded by its express terms and for that purpose the Act is to be treated as non-existent. In other words the stridhana heirs are to be ascertained with reference to the general provisions of the Hindu law of inheritance ignoring the statutory heirs who are introduced by the Act.

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1. I.L.R. (1942) Nag. 629.
2. (1946) 1 M.L.J. 196 : I.L.R. (1947) Mad. 23.
3. (1949) 2 M.L.J. 126.
4. (1948) I.L.R. 26 Pat. 150.
5. A.I.R. 1937 Lah. 196.
6. I.L.R. (1939) Bom. 228.
7. A.I.R. 1944 Lah. 442.
8. I.L.R. 1949 All. 816.

ARUNACHALA CHETTIAR *v.* VADLA KOUNDAN, (1952) 1 M.L.J. 400.

This decision deals with a point on which there is not much authority. It holds that where after an execution sale and before its confirmation the judgment-debtor died, a confirmation order without impleading the legal representatives of the judgment-debtor will be a nullity. Order 21, rules 89, 90 and 91 of the Civil Procedure Code provide for the preferring of applications to set aside a sale and rule 92 states that where no application under any of the rules is made or where an application made is disallowed the Court shall make an order confirming the sale and the sale thereupon shall become absolute. Confirmation is thus a condition precedent for the sale to become absolute. Also when once a sale has been held, in the absence of any application to set it aside the Court has no jurisdiction to refuse to confirm it. In other words confirmation is automatic. The title of the purchaser dates only from confirmation. The question still remains whether an order of confirmation can be passed without the presence of the parties who are sought to be bound. The language of sub-clause 3 of rule 92 that no suit to set aside an order made under this rule shall be brought by any person against whom such order is made would suggest that the bar will operate only if the party sought to be affected had notice, and conversely a person who had no notice and against whom therefore the order could not be deemed to have been passed will not be bound by it. In *Kamakhya Dutt Ram* v. *Shyam Lal*[1], a sale of property in execution had taken place in the lifetime of the judgment-debtor and had been confirmed without bringing the deceased's legal representatives on the record of the execution case and without notice to them. It was held by Wazir Hasan, Ag. C.J., and Misra, J., that the confirmation was not on that account invalid. It was observed: "The sale had taken place in the lifetime of the judgment-debtor and there are no provisions in the Civil Procedure Code which require legal representatives of a judgment-debtor who has died after the sale, to be brought on the record for purposes of confirmation. The case may be different if a judgment-debtor dies before the date of the sale and the sale takes place behind the back of his legal representatives." The observation fails to take note of the spirit behind rule 92 (3) of Order 21. In view of it, the position adopted in the case under review seems to be more acceptable.

ABDUL AZEEZ *v.* PATHUMMA BI, (1952) 1 M.L.J. 463.

This decision draws attention to the definite cleavage of judicial opinion which exists in regard to the precise scope of section 2 (*a*) of the Indian Majority Act. Section 3 of the Act lays down that every person domiciled in India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before. So till completion of eighteen years a person is a minor. And Order 32, rule 1 of the Civil Procedure Code, provides that every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. It follows that a suit by a person who has not completed the age of eighteen years can be instituted only by a next friend. Section 2 (*a*) of the Majority Act has, however, laid down that nothing contained in that Act shall affect the capacity of any person to act in the matter of marriage, dower, divorce and adoption. The question is whether these words can be taken to control the provision in Order 32, rule 1, Civil Procedure Code and dispense with the requirement of a next friend where the suit in question concerns the matters specified in section 2 (*a*). The expression "capacity to act in the matter of marriage" is ambiguous in import and unhappy, *Maung Tun Aung* v. *Ma E Kyi*[2]. It is also not very apt as applied to dower though it is full of meaning as applied to the other three classes, *Abi Dhunimsa Bibi* v. *Mahammad Fathiuddin*[3]. In *Puyikuth Ithayi Umah* v. *Kairhirapokil Mamod*[4], it was pointed out by Turner, C.J. and Tarrant, J., that the words must be taken to refer to the capacity to contract which is limited by

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1. A.I.R. 1929 Oudh 235.
2. (1936) I.L.R. 14 Rang. 215: A.I.R. 1936 Rang. 212 (F.B.).
3. (1917) 35 M.L.J. 468. I.L.R. 41 Mad. 1026.
4. (1881) I.L.R. 3 Mad. 248.

section 11 of the Contract Act and not to the capacity to sue which is purely a question of procedure and regulated by the Civil Procedure Code. In that view it was held that a suit by a Mapilla woman against her husband and her father-in-law for past maintenance, dower and stridhana cannot be brought without being represented by a next friend, though she had attained puberty and was a major according to the Muslim personal law inasmuch as she was a minor under the general law being not even 15 years old. This decision was followed in *Abi Dhunimsa Bibi* v. *Mahammad Fathiuddin*[1], where it was held that a Muslim wife who was a major under her personal law but not under the Majority Act cannot make a valid relinquishment of her dower. It was pointed out by the learned Judges that the object of section 2 (*a*) was to confer a privilege and not to endanger ordinary civil rights and that the ordinary law was intended to take its course in respect of the correlative rights flowing out of marriage, etc., that the word " act " only meant initiate to the religious act or ceremony. In *Maung Tun Aung* v. *Ma E Kyi*[2], it was observed that the words " capacity to act in the matter of marriage " meant capacity to be a party to a valid marriage and related to the acts of the parties by which the status is changed and could not apply to a pre-nuptial agreement to contract a marriage in future. The scope of the expression " capacity to act in the matter of marriage " etc., fell to be examined in *Najmunnissa Begum* v. *Sirajuddin Ahmad Khan*[3], by the Patna High Court and Mohamad Noor, J., observed in the course of his judgment : " The provisions of the section govern only the performance of marriage or effecting of divorce by persons who though not majors according to the Act are so according to their personal law. But once a marriage has been performed and the dower has been settled, the dower becomes a property of the wife like her any other property. The dower is a debt payable to the wife and any transfer of this debt, or foregoing it altogether or any portion of it are not matters in any way connected with marriage and such acts must be governed by the ordinary law of the land." Yet another point favouring a restricted interpretation of the word " act " in section 2 (*a*) of the Majority Act is brought out in the decision of the Lucknow Chief Court in *Usman Ali Khan* v. *Mt. Khatton Banu*[4], where it is observed : " dower and divorce are themselves connected with marriage, and if the words "to act in the matter of marriage" were given the expanded meaning . . . . . then it would only be necessary to say, ' the capacity of any person to act in the following matters, namely, marriage and adoption ' . . . . . These words must be construed in a restricted sense and . . . . ' to act in the matter of marriage ' means only to enter into the contract of marriage '. The learned Judge concluded by holding that section 2 (*a*) merely relieves a party of some of the consequences of minority, but the party remains a minor none the less, and that being so, the provisions of Order 32, rule 1, Civil Procedure Code, still apply and in respect of the institution of a suit the party will have to act through a next friend only. A different view as to the meaning of the words ' to act in the matter of marriage, *etc.*,' has been taken in decisions of the Bombay, Calcutta, and Allahabad High Courts. In *Bai Shirinbai* v. *Kharshedji*[5], Farran, C.J., observed that what section 2 (*a*) of the Majority Act stated was about ' capacity to act ' and not about ' capacity to contract ' and hence the former words will take in capacity to sue as well. In *Mozharul Islam* v. *Abdul Ghani Ala*[6], Suhrawardy, J., took the view that 'act in the matter of dower ' meant the doing of ' all acts in relation thereto '. And in *Mt. Fatima Khatun* v. *Fazlal Karim Mea*[7], adopting a similar wide construction, Cumming and Mukherji, JJ., held that capacity to act in the matter of divorce will include a capacity in a minor husband to delegate to his wife a power of divorce. So also on similar lines of reasoning, in *Naksetan Bibi* v. *Habibar Rahaman*[8], Akram, J., held that the words 'act in the matter of divorce ' are wide enough to include the institution of a suit for dissolution of her marriage

1. (1917) 35 M.L.J. 468 : I.L.R. 41 Mad. 1026.
2. (1936) I.L.R. 14 Rang. 215 : A.I.R. 1936 Rang. 212 (F.B.).
3. (1937) I.L.R. 17 Pat. 303.
4. (1941) I.L.R. 17 Luck. 572 : A.I.R. 1942 Oudh 243.
5. (1896) I.L.R. 22 Bom. 430.
6. A.I.R. 1925 Cal. 322.
7. A.I.R. 1928 Cal. 303 : 47 C.L.J. 372.
8. A.I.R. 1948 Cal. 66.

by a minor who under her personal law may have attained the age of majority. In *Qasim Husain* v. *Bibi Kaniz Sakina*[1] the Allahabad High Court held that the settlement of dower as well as its relinquishment will fall within the exceptions contained in section 2. On a review of the different lines of reasoning it looks as if the view taken by the Madras High Court is more acceptable. Words take colour from the setting in which they occur and the context in which they are employed. The Majority Act is essentially concerned with substantive law. In matters of procedure the Civil Procedure Code is exhaustive on the matters with which it deals and there is no saving of personal laws to any extent. Also to give a wide construction to the words " act in the matter of marriage " will make otiose the reference to acting in the matter of dower and divorce. *Prima facie* acting in the matter of marriage means doing everything till the marriage and participating therein. It cannot refer to correlative rights or consequences flowing from it. Again the right of suit is a remedy and not a consequence of marriage.

DEVANUGRAHAM, *In re*, (1952) 1 M.L.J. 550.

This decision is of interest for its statement, that section 403, Criminal Procedure Code, is nothing more than an elaboration of the principle which underlies Article 20 (2) of the Constitution of India, that no citizen should be put in jeopardy of his life or liberty more than once. It is a time-honoured maxim of English common law that a man, whether he has been acquitted or convicted should not be tried again for the same offence. At the same time that law had recognised that if the case were one where the tribunal was *ex facie* wholly unauthorised, and the accusation and the accused plainly *coram non judice* the matter would be entirely different and in such a case the pretended adjudication of the usurping tribunal would appear to be a mere nullity, not merely voidable but void. See *Reg* v. *Justices of Antrim*[2]. In that view it was held that where the conviction of a prisoner was technically a nullity, a second trial was not barred. The plea of *autrefois convict* will be of no avail when the first indictment was invalid and when on that account no judgment could have been given, because the life of the defendant was never before in jeopardy[3]. In *Rex* v. *Bowman*[4] the prisoner had been convicted on a day to which the case had not been adjourned properly and the conviction was on that ground held to be a nullity and not to preclude a fresh trial. In *Rex* v. *Bates*[5], a prisoner had been convicted on an indictment charging him with an offence under section 2 of the Explosive Substances Act, 1883. Section 7 of that Act required the consent of the Attorney-General to the preferment of the indictment and such consent not having been obtained it was held that there was no jurisdiction to try the indictment and the conviction was therefore a nullity. In *Rex* v. *Marsham: Ex parte Emmeline Pethick Lawrence*[6] a person had been convicted by the Magistrate of assaulting a police constable in the execution of his duty, but by some inadvertence the constable who was assaulted gave his evidence at the hearing of the charge without being sworn. On the Magistrate's attention being called to this irregularity, he later in the same day reheard the case, all the evidence being given upon oath. The Magistrate again convicted the person. It was held that as the accused had not been in peril at the time of the second hearing the second conviction was good. Lord Alverstone, C.J., observed : " In order to set aside the second conviction the applicant must show that the Magistrate has done something on the previous hearing which either exhausted his jurisdiction to rehear or which made it unjust that the applicant should be put on her trial in regard to the offence charged. In my judgment the Magistrate, finding out that upon the first hearing he had before him evidence which was not admissible and had therefore not heard and determined the case according to law, was entitled in the exercise of his jurisdiction to have the case heard and tried before him on proper evidence ". In India there

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1. (1932) I.L.R. 54 All. 806.
2. (1895) 2 Ir. Rep. at p. 636 (per Lord O'Brien, C.J.).
3. Chitty's Criminal Law, 2nd Edn., Vol. I, p. 463.
4. (1834) 6 C. & P. 337: 172 E.R. 1266.
5. (1911) 1 K.B. 964 (C.C.A.).
6. (1912) 2 K.B. 362.

are two statutory provisions which bear on the matter, namely, section 403 of the Criminal Procedure Code and Article 20 (2) of the Constitution of India. Section 403 states *inter alia* that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence. Article 20 (2) of the Constitution provides : " No person shall be prosecuted and punished for the same offence more than once ". In *Basdeo Agarwalla* v. *King-Emperor*[1], the Federal Court had pointed out that a prosecution launched without a valid sanction is a nullity. The position was carried further by the Judicial Committee in *Yusofalli Mulla Noorbhoy* v. *The King*[2], where it was pointed out that the whole basis of section 403 (1), Criminal Procedure Code, is that the first trial should have been before a Court competent to hear and determine the case and to record a verdict of conviction or acquittal and that a Court cannot be competent to hear and determine a prosecution the institution of which is prohibited in the absence of a valid sanction. It was further held that where in a prosecution launched without a sanction as required by law, an order of acquittal is passed, it would not, on the omission of the Government to appeal against it become binding, because the order being a nullity there is nothing to appeal against. It was also laid down that an order of acquittal passed in such a prosecution cannot be pleaded as a bar to a subsequent prosecution on the same facts but after obtaining a proper sanction. The decision is perhaps of larger interest in so far as it considered the scope of section 403 and whether it precludes appeal to the common law rule on the matter. The question whether section 403 constitutes a complete code in India upon the subject of *autrefois acquit* and *autrefois convict* or whether in a proper case the common law can be called in aid to supplement the provisions of the section was left open, but it was stated by the Judicial Committee that to rely apart from the terms of section 403 upon the common law rule that no man should be placed in jeopardy twice, it must be shown that the first trial was before a Court competent to pass a valid order of acquittal or conviction and for this purpose there is no distinction between a conviction and an acquittal. Now Article 20 of the Constitution bars double punishment for the same offence. The language of the Article has given rise to a number of questions. One of these relates to the construction of the words " prosecuted and punished ". If construed in the literal sense, taking the word " and " conjunctively, it would mean that a second trial would not be precluded unless the accused had been not only prosecuted but was also punished as well on a former occasion for the same offence. That would mean that the protection afforded by *autrefois acquit* will not be available. If on the other hand the word " and " is to be interpreted disjunctively the clause will not only include the plea of *autrefois acquit* but would also prevent a fresh prosecution. In *Gopalakrishna Naidu* v. *State of Madhya Pradesh*[3] it is pointed out that the word " and " in Article 20 cannot be read as " or ", that though by construing the Article literally the protection given by the Constitution will not be as extensive as that given by section 403, Criminal Procedure Code, to a person who has been tried for an offence, there is no reason why the literal meaning should be departed from. In the instant case also it is held that the word " and " has certainly been used in a conjunctive and not a disjunctive sense because to hold differently would be reading into the Article something which is not there. As to the argument that in that view Article 20 (2) would not cover other cases known to the existing law either with reference to the permissibility of fresh prosecutions or with reference to the non-maintainability thereof it is pointed out that this is so for the reason that the criminal law of the land " can hereafter be amended in the ordinary way for the purpose of altering the existing law subject to the provision in clause 2 of Article 20 which being one of the fundamental rights cannot be taken away or abridged or contravened." In this view the instant case decides that where an accused is discharged for want o

1. (1945) 1 M.L.J. 369 (F.C.).
2. (1949) 2 M.L.J. 461 : L.R. 76 I.A. 158 (P.C.). See also *P. Banerjee* v. *Bepin Behari*, (1926) 30 C.W.N. 382; *Hori Ram Singh* v. *The Crown*, (1939) F.C.R. 159: (1939) 2 M.L.J. (Supp.) 23 (F.C.) and *Gopalakrishna Naidu* v. *State of Madhya Pradesh*, A.I.R. 1952 Nag. 170.
3. (1952) Nag.L.J. 221: A.I.R. 1952 Nag. 170.

sanction there is no punishment and when a man is punished departmentally there is no prosecution and therefore Article 20 (2) of the Constitution of India does not take away the right to institute a second prosecution when the first is found to be a nullity by reason of want of sanction, a pre-requisite for the maintaining of the prosecution.

OFFICIAL ASSIGNEE *v.* NARAYANA MUDALIAR, (1952) 1 M.L.J. 662.

Competence to contract is covered by section 11 of the Indian Contract Act. It provides that every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. Section 103-A of the Presidency Towns Insolvency Act and section 73 of the Provincial Insolvency Act enumerate the disqualifications arising on insolvency but there is nothing in them to disqualify an insolvent from entering into a contract. In *Morgan* v. *Knight*[1], it was held by Erle, C.J., that a person may become insolvent a second time before he has received his final discharge under the first insolvency. The principle has been followed in *Dossa Gopal* v. *Bhanji*[2]. These decisions suggest that insolvency is not a disqualification precluding a person from contracting and there is nothing in law to prevent an insolvent who has not yet obtained his discharge from borrowing again or making himself liable financially and in that way get himself adjudicated bankrupt on the basis of the debts not covered by the prior insolvency. Consistently with this one finds that in regard to debts incurred after adjudication they are not provable in insolvency and a creditor is remitted to his ordinary remedy at law. Thus a debt incurred on a promissory note executed by the insolvent after the adjudication cannot be proved under section 34 of the Provincial Insolvency Act and the creditor can file a suit for its recovery, *Kallu* v. *Agha Salim*[3], *Hiralal* v. *Tulsi Ram*[4]. In *Sriram* v. *Ram Chunder*[5], it was held that in respect of a debt contracted subsequent to adjudication and prior to discharge, leave of Court was not necessary for its enforcement and that section 28 (2) does not apply. Similarly in *Gustasp Behram Irani* v. *Bhagvandas Sobharam*[6], it was held that the debt or liability would not be provable and section 46 (2) of the Presidency Towns Insolvency Act would not apply if the debtor had become subject to the liability by reason of any obligation incurred after the date of the order of adjudication. The instant decision is in line with these authorities in holding that there is nothing in any of the provisions of the Presidency Towns Insolvency Act which prohibits expressly or impliedly an insolvent from borrowing or entering into contracts giving rise to financial liability after adjudication and prior to discharge and that the liability under the contract so entered can be enforced in appropriate proceedings and that it would be wrong to say that no Court has got any power or jurisdiction to entertain a suit against an insolvent on the basis of a debt incurred by him while an undischarged insolvent.

RAVIPATI SITARAMAYYA, *In re*, (1952) 1 M.L.J. 690.

This decision deals with a point which occurs only rarely but is still of unusual interest. Difference of opinion in referred trials and murder cases involving life and death arises in exceptional cases only. It does however arise. Section 378, Criminal Procedure Code, provides for a resolution of differences of opinions in referred trials on the submission of sentences for confirmation by the High Court. Section 429 applies to references to a third Judge in other cases. It reads: "When the Judges composing the Court of appeal are equally divided in opinion, the case, with their opinion thereon, shall be laid before another Judge of the same Court, and such Judge after such hearing as he thinks fit shall deliver his opinion, and the judgment or order shall follow such opinion." It is clear that both sections 378 and 429 make it mandatory for the judgment or opinion of the Court to follow the opinion of the third Judge. There is, however, a dearth of case-law defining

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1. (1864) 15 C.B. (N.S.) 669 : 143 E.R. 947.
2. (1901) I.L.R. 26 Bom. 171.
3. (1925) 89 I.C. 923.
4. A.I.R. 1925 Nag. 77.
5. (1929) I.L.R. 52 All. 439.
6. (1931) I.L.R. 55 Bom. 649.

the scope of the third Judge's method of approach to such a reference. In *Daulat Ram* v. *Emperor*[1], it is said that the case laid before the third Judge is the *complete* case of the prisoner as to whom the Judges are divided in opinion and that it is his duty to consider *all* the points involved before he delivers his opinion upon the case. In *Khetri Bewa* v. *State*[2], it has been suggested that the hearing before the third Judge *need not be a full hearing and then giving an independent opinion*, but that all that is required is that the hearing should only consist of judging the respective merits of the two conflicting opinions of the two learned Judges for the purpose of deciding whether to agree or disagree with any one of them. The instant case deals in particular with the method of approach to be adopted by a third Judge in references under section 378 or section 429 and to the sentence which such Judge could pass. In *Empress* v. *Debi Singh*[3], Mahmood, J., favoured the view that where the difference of opinion related to the weight of evidence as to the propriety of conviction, the opinion of the Judge as to acquittal should generally prevail. And it is stated that in R.T. No. 31 of 1951, the learned third Judge observed : "Where the main question at issue is identity of the assailants. . . . the very fact, that one of the two learned Judges, who had to decide that question was of the view, that the identity of the accused with those assailants had not been established beyond all reasonable doubt, should suffice to establish the basis for such a reasonable doubt the benefit of which, of course, the accused have to get. In my opinion, a third Judge to whom the question is referred under section 378. . . . . should normally accept that finding, unless the compelling necessity of conclusive evidence on record drives him to deny the existence of any basis for a reasonable doubt." This line of approach would to some extent affect the complete freedom which seems to be available to the third Judge on the language, for instance, of section 429 to form his opinion. It would give as it were a sort of weightage in effect to the opinion of the Judge who had favoured an acquittal. That it ought not to be so seems to be the view of Edge, C.J., in *Empress* v. *Bundu and another*[4]. There the learned Chief Justice observed : "When Judges unfortunately differ in opinion, I conceive it to be the duty of each Judge to express and act upon the opinion which he himself has definitely arrived at. Before so expressing himself he should of course carefully weigh the reasons adduced by his brother Judge for forming a different opinion ; but if those reasons do not commend themselves to his mind, he must not in the exercise of his duty, allow the fact that his brother Judge has arrived at a different conclusion, to influence his conduct whether his view—to take a criminal case—be in favour of a conviction or of an acquittal. There would be no meaning in sections 378 and 429 if it was intended that the opinion of one Judge in favour of an acquittal should prevail." The approach to be made by the third Judge on a reference consequent on difference of opinion between the two appellate Judges has been considered in *Md. Illias Mistri* v. *The King*[5], where it was stated : "There can be no doubt upon the wording of the section (429) that the whole case is now before me, which means not only that I am at liberty, but that it is also my duty to examine the whole of the evidence for myself and come to a final judgment. It is not a case of merely weighing the opinion of one learned Judge against that of the other deciding which of these opinions I should accept." Even as in a first appeal the entire case is liable to be examined so also the third Judge has the whole case before him. There is much to commend this view. As to the sentence which the third Judge may on such reference pass, there are conflicting opinions set out in the instant judgment. One of the learned Judges felt that the third Judge cannot pass a death sentence in a case where the Judge favouring conviction, thinks a sentence of transportation will be adequate and appropriate while the other Judge favoured acquittal and that the Bench referring the case can always express their opinion that in the event of the conviction being confirmed a sentence of transportation is the appropriate one in which case the third Judge would be bound by the opinion. The other learned

1. A.I.R. 1947 Lah. 244.
2. A.I.R. 1952 Orissa 37.
3. (1880) All.W.N. 287.
4. (1887) All.W.N. 137.
5. I.L.R. (1949) 1 Cal. 43.

Judge took the view that no such fetter can be imposed on the third Judge and that he is at liberty to express and act upon the opinion he arrives at and can pass a sentence of death even though one Judge has favoured an acquittal and the other has awarded a sentence of transportation for life in convicting the accused. In *Ramaswami Goundan* v. *Emperor*[1], the Sessions Judge had convicted the accused on a charge of murder and sentenced him to death. On appeal, Subrahmanya Ayyar, Offg. C.J., confirmed the conviction and commuted the sentence to transportation for life. Boddam, J., set aside the conviction and sentence and acquitted the accused. On a reference under sections 378 and 429, Criminal Procedure Code, Bhashyam Ayyangar, J., confirmed the sentence passed by the Sessions Judge and dismissed the appeal. There is no doubt no advertence to the question whether the third Judge on reference was competent to pass any sentence that he liked. The fact, however, remains that he exercised such a power and there is nothing in the statutory provisions against such exercise. Also if the entire case is before the third Judge on the reference there is no reason to hold that he cannot have a discretion in the matter of passing the sentence.

NAGI REDDI *v.* DURAIRAJA NAIDU, (1952) 1 M.L.J. 746 (S.C.).

This is an instructive decision relating to surrender by a Hindu widow. It is now bootless to inquire what foundation is afforded by the texts of Hindu law regarding the principles of surrender. For in any case it is settled by long practice and confirmed by decisions that a Hindu widow can renounce in favour of the nearest reversioner if there be only one or of all the reversioners nearest in degree if more than one at the moment, *Rangaswami Goundan* v. *Nachiappa Goundan*[2]. The basis of it is the effacement of the widow's interest and not the *ex facie* transfer by which such effacement is brought about, *Sitanna* v. *Viranna*[3]. Being an effacement or renunciation by her, it follows that the surrender can only be in favour of the nearest reversioner or reversioners. No surrender and accelaration can possibly be made in favour of anybody except the next heir of the husband. In favour of a stranger there can be an act of transfer but not one of renunciation. The position cannot be different where the surrender purports to be made in favour of the next heir and another. In such a case admittedly what passes to the next heir is not the totality of the interest of the widow, the entire estate of the husband, but something less. In *Abhoya Pada Trivedi* v. *Ram Kinkar Trivedi*[4], the surrender had been made by a widow in favour of her husband's brother and three sons of another brother of the husband. It was argued that it cannot be considered a surrender in favour of the next reversioner but was really partly a surrender and partly an alienation. Cumming, J., rejected the argument and said : "I do not think there is much substance in this contention. It is a question more of form than of substance." In *Mt. Jagrani* v. *Gaya*[5], a widow had executed a deed of gift of her husband's estate in favour of her daughter and a stranger, a son of her daughter's husband's brother. It was held that it was not a valid surrender. It is, however, interesting to note that Rachhpal Singh, J., in distinguishing the previous case spoke of it as a case of surrender to the nearest reversioners and others who also were reversioners and therefore was valid. Niamatulla, J., the other learned Judge, however, observed : "but if the learned Judge meant . . . . that in every case where a transfer is made in favour of the next heir and a third person jointly, the transaction amounts to a surrender in favour of the presumptive heir and an assignment by the latter of half to the other, I regret, I am unable to endorse the proposition of law." In *Bala* v. *Baya*[6], a Hindu widow made a gift of the entire estate of her husband in favour of her daughter and her husband jointly, the daughter being the next heir at the time. It was held it was not a valid surrender inasmuch as it was not a gift in favour of the daughter alone. The facts of the case were similar to those of the Bombay case and the Supreme Court held that the surrender in those circumstances was invalid. The instant case is of importance really in regard to

1. (1903) 14 M.L.J. 226 : I.L.R. 27 Mad. 271.
2. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72 : I.L.R. 42 Mad. 523 (P.C.).
3. (1934) 67 M.L.J. 20 : L.R. 61 I.A. 200 : I.L.R. 57 Mad. 749 (P.C.).
4. A.I.R. 1925 Cal. 228.
5. A.I.R. 1933 All. 856.
6. (1935) I.L.R. 60 Bom. 211.

another aspect of the law of surrender. It had been argued that the transaction can be looked upon as a surrender by the widow in favour of her daughter, and a conveyance by the latter of half of the estate in favour of her husband. The basis for the argument was sought in the view taken in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*[1], where Sir Richard Garth, C.J., had observed that if it is once established as a matter of law that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation which the widow and the next heir may agree to make. More as a matter of *stare decisis* than for any other reason it had been held that such a transaction if it related to the entire estate could be supported on the theory of surrender. In *Debi Prosad Chowdhury* v. *Golap Bhagat*[2], Sir Lawrence Jenkins, C.J., observed apropos of *Nobokishore's case*[1]: "The road to the decision in *Nobokishore's case*[1] was not without its difficulties, but the learned Judges felt it had to be travelled that titles might be quieted." Certain observations of the Judicial Committee in the *Gounden case*[3] lent countenance to the view that the position reached in *Nobokishore's case*[1] was not open to review hereafter. Lord Dunedin had said: "The surrender, once exercised in favour of the nearest reversioner or reversioners, the estate became his or theirs, and it was an obvious extension of this doctrine to hold that inasmuch as he or they were in title to convey to a third party, it came to the same thing if the conveyance was made by the widow with his or their consent. This was decided to be possible by *Nobokishore's case*[1]. The judgment went upon the principle of surrender and it might do so for the surrender there was of the whole estate." That the matter is not so concluded seems clear from the observations of the Privy Council in *Narayanaswami Aiyar* v. *Rama Ayyar*[4]. There one Thayammal whose two daughters Thailammal and Lakshmiammal were the nearest reversioners had executed deeds by which her husband's estate was passed to remoter persons. It was found that the daughters had not consented to the transaction. It was observed by the Privy Council: "It was, however, argued . . . . . that the surrender by the widow was valid because the daughters Thailammal and Lakshmiammal consented to the transactions carried out by the deeds of July, 1867, so as to efface their own interests and that consequently not only the interest of the widow, but also the interests of her daughters in the property were effaced. Their Lordships are relieved from the necessity of expressing any opinion on the important question of law involved in this contention in view of their above-mentioned conclusion that it was not proved that the daughters . . . . . did in fact consent or acquiesce in the said transactions". It is really difficult to see how an alienation otherwise unauthorised can acquire sanctity by the blessings of a person who himself has no right in the property but is merely an expectant heir and which expectation may never come to fruition. Also it seems strange that mere consent should be regarded as equivalent to a conveyance by the reversioner in favour of a stranger, particularly when the widow never gave the property to the next heir but gave it directly to the stranger. Again it is quite possible that the widow would never have given it to him even if he wanted it and it is not even certain that if he got it, he would ever have sold it, *Ali Mohammad* v. *Mt. Mughlani*[5]. It is difficult to say in the first place why a surrender should be presumed at all when the property is given directly to the stranger. Further if the actual reversioner at the time of the widow's death is a person different from the one who gave consent there seems to be no justification for holding that he would be bound by the consent expressed by a person who had nothing but a chance of succession at that time and which chance did not materialise at all. In view of these and other weaknesses inherent in the position indicated in *Nobokishore's case*[1] the Supreme Court in the instant case observed: "It may be necessary for this Court at some time or other to reconsider the whole law on this subject. It seems probable that the Privy Council did not subject the decision in *Nobokishore's case*[1] to a critical examination from the point of view of the doctrine of surrender, as the transfer in that case was upheld on the ground of legal necessity as well."

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1. (1884) I.L.R. 10 Cal. 1102 (F.B.).
2. (1913) I.L.R. 40 Cal. 721 (F.B.).
3. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72 : I.L.R. 42 Mad. 523 (P.C.).
4. (1930) L.R. 57 I.A. 305 : I.L.R. 53 Mad. 692 (P.C.).
5. A.I.R. 1946 Lah. 180 (F.B.).

APPALANARASIMHALU *v.* BOARD OF REVENUE, MADRAS, (1952) 1 M.L.J. 641.

Section 57 (1) of the Stamp Act gives power to the Chief Controlling Revenue Authority to state any case referred to it under section 56 (2) or otherwise coming to its notice and refer such case to the High Court. The scope of the power as well as the duty which it engenders are matters of considerable interest. In *Julius* v. *Lord Bishop of Oxford*[1], with reference to the provision in section 3 of the Church Discipline Act, 3 and 4 Vic., c. 86, that it shall be lawful for the Bishop of the Diocese within which the offence was alleged to have been committed to issue a commission for the purpose of inquiry, Lord Cairns, L.C., observed: " They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so." In *Alcock Ashdown & Co.* v. *Chief Revenue Authority, Bombay*[2], on the wording of section 51 of the Indian Income-tax Act, stating that the Chief Revenue Authority may state a case, after recognising that " when a capacity or power is given to a public authority, there may be circumstances which couple with the power a duty to exercise it," Lord Phillimore went on to observe : " In their Lordships' view, always supposing there is a serious point of law to be considered there does lie a duty upon the Chief Revenue Authority to state a case for the opinion of the Court and if he does not appreciate that there is such a serious point it is in the power of the Court to control him and to order him to state a case." The Bombay High Court had to consider the scope of section 57 of the Stamp Act in *The Chief Controlling Revenue Authority, Bombay* v. *Maharashtra Sugar Mills, Ltd.*[3], and it was pointed out that it would be no safeguard at all if section 57 (1) were to be interpreted as giving a power to the Revenue Authority without any duty being coupled with it and therefore the subject must be held definitely to have a right given to it in certain cases to have a case referred to the High Court and that right makes it obligatory upon the Revenue Authority to exercise the power given to it for the benefit of the subject. It was held that when a serious question of law is involved there is a duty cast upon the Chief Controlling Revenue Authority to state a case under section 57 (1) and the subject has a right to have such a case determined by the High Court and that duty can be enforced by section 45 of the Specific Relief Act. On appeal, the Supreme Court of India has in *Chief Controlling Revenue Authority* v. *Maharashtra Sugar Mills, Ltd.*[4], affirmed the judgment of the High Court and stated that the power contained in section 57 is in the nature of an obligation or is coupled with an obligation and can be demanded to be used also by the parties affected by the assessment of the stamp duty. Kania, C.J., observed : " It is coupled with a duty cast on him as a public officer to do the right thing and when an important and intricate question of law in respect of the construction of a document arises, as a public servant it is his duty to make the reference." In the instant case, the principle thus enunciated has been followed and it was held that if the public servant omitted to do so, the Court can issue a mandamus to direct him to discharge that duty and make a reference.

VEERAPPA PILLAI *v.* RAMAN AND RAMAN, LTD., (1952) 1 M.L.J. 806 (S.C.); PARRY AND CO. *v.* COMMERCIAL EMPLOYEES ASSOCIATION, (1952) 1 M.L.J. 813 (S.C.)

Both these are decisions of the Supreme Court relating to the issue of *certiorari*. The former case arose in relation to the Motor Vehicles Act—Act IV of 1939, and the latter with reference to the Madras Shops and Establishments Act—Act XXXVI of 1947. In both cases the issue of the writ by the High Court was set aside. Both decisions draw pointed attention to the fact that however extensive the jurisdiction of the High Court under Article 226 of the Constitution may be, it is not so wide or large as to enable the High Court to convert itself into a Court of

1. (1880) 5 A.C. 214, 222.
2. (1923) 45 M.L.J. 592 : L.R. 50 I.A. 227 : I.L.R. 47 Bom. 742 (P.C.).
3. I.L.R. (1948) Bom. 672.
4. (1950) 2 M.L.J. 564 (S.C.).

appeal and examine for itself the correctness of the decisions impugned. In the first case it is also stated that where the remedies for the redress of grievances or the correction of errors are found in the statute itself, it is to those remedies that resort must generally be had and not to *certiorari*. The second case suggests that in spite of statutory provision laying down that the decision of the Special Authority or Tribunal (for instance, the Labour Commissioner) would be final and incapable of being challenged in any Court of law, the superior Court is not absolutely deprived of the power to issue a writ of *certiorari*, although it can do so only on the ground of either a manifest defect of jurisdiction in the Tribunal that made the order or of a manifest fraud in the party procuring it. An ambitious claim for *certiorari* is to be seen in the language of Holt, C.J., in *Viner's Abridgment*[1] that "there is no Court or jurisdiction which can withstand a *certiorari*." It had also been said that the King's Bench will never "allow a nullity to remain upon the record whatever be the power or competence of the King's Bench Court as regards the question in issue," Re *Heaphy*[2], *Lalor* v. *Bland*[3]. These were however decisions of the Irish Courts. The English practice is that the writ will issue only in respect of matters which are within the Court's jurisdiction.[4] Even if decisions of special tribunals may have been declared to be final and *certiorari* taken away *certiorari* may be granted where the inferior Court has acted without or in excess of jurisdiction, for, in such a case the Court has not brought itself within the terms of the statute taking away *certiorari*, *Colonial Bank of Australia* v. *Willan*[5]. The enunciation mentioning the circumstances under which the writ will be granted, generally quoted in this connection is that of Atkin, L.J., in *Rex* v. *Electricity Commissioners*[6]. The Lord Justice laid down : "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs." And in *Rex* v. *Chancellor of St. Edmondsbury and Ipswich Diocese*[7], Evershed, L.J., observed : "Whenever, as a result of the establishment by Act of Parliament of some new jurisdiction or some new tribunal exercising judicial or quasi-judicial functions, it is necessary to consider the application thereto of well-established forms of remedy, the Court will not be afraid to extend the older principles to new circumstances." This is a valuable statement supporting the trend reflected in the second of the instant decisions.

MURUGAPPA CHETTI & SONS *v.* COMMISSIONER OF INCOME-TAX, MADRAS, (1952) 2 M.L.J. 17.

It is familiar knowledge that there is nothing precluding the *karta* or manager of a joint Hindu family from holding offices and positions of a remunerative character. In such cases, the question often arises whether the income earned will appertain to the joint family of which he is the *karta* or will be his self-acquired or separate property. The yardstick applied in all such cases is to find out from the facts of each case whether the acquisition is referable to any detriment to the paternal estate. In regard to the case of a manager holding the office of managing agent of a company, Chagla, J., remarked : "To my mind it is impossible to contend that the mere office of managing agents without any benefits attaching to it can never be deemed to be joint family property," *Ramchandra* v. *Chinubhai*[8]. In *Commissioner of Income-tax, Bihar and Orissa* v. *Darsanram*[9], two undivided families represented by their respective managers owned a limited company and the managers received certain sums as directors' fees. It was held for purposes of section 3 of the Income-tax Act that the amounts must be regarded as their personal earnings and not as the income of the joint family, inasmuch as joint family property had not been spent in earning the remuneration by way of directors' fees. *Haridas*

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1. Vol. IV, p. 336.
2. (1888) 22 L.R. Ir. 500.
3. (1858) 8 Ir. C.L.R. 115.
4. Halsbury, Laws of England, 2nd edn., Vol. IX, p. 854.
5. (1874) L.R. 5 P.C. 417.
6. (1924) 1 K.B. 204 (C.A.).
7. (1948) 1 K.B. 195, 222-223 (C.A.).
8. A.I.R. 1944 Bom. 76, 79.
9. A.I.R. 1946 Pat. 50.

Purushottam, In re[1], illustrates when the income could be regarded as joint family property. There an assessee was partner in a Mill as *karta* of a joint family consisting of himself and his sons, the other partners being his two divided brothers. In 1918 these three with five others purchased a Mill in partnership, the assessee being partner as *karta* of his family. In 1920, the eight partners promoted a limited company which took over the Mill of the 1918 partnership. Under an agreement between the partnership and the new company, the eight partners who sold the Mill to the company became the Managing Agents of the new company. The assessee got the opportunity of being appointed a Managing Agent directly from the sale of the Mill which in part was the joint family property of himself and his sons. In the circumstances, it was held by Stone, C.J. and Chagla, J., that the assessee's share of the income from the Managing Agency must be treated as income of the family. In *Commissioner of Income-tax, Madras* v. *Sankaralinga Ayyar*[2], the shares necessary for qualifying for the managing directorship of a concern were acquired by the *karta* from out of the family funds. But inasmuch as it cannot be said that his appointment was on behalf of and for the benefit of the family and inasmuch as the remuneration earned was in consideration of the services which he rendered to the company, it was held that the remuneration will ordinarily be self-acquisition only unless thrown into the common stock. It was observed that so long as there is no detriment to the family property and so long as the corpus or the income of the family property is not utilised or spent in making the acquisition or in earning the remuneration, the latter cannot be treated as joint family property. The instant case is in line with these authorities in holding that the commission earned under a managing agency agreement by the *karta* of a coparcenary would *prima facie* be his individual property unless it is shown that the rights were acquired by utilising joint family funds.

MARIYAMUMMA *v.* UMMAR KUTTI, (1952) 2 M.L.J. 43.

This decision deals with an interesting question under section 13 of the Madras Survey and Boundaries Act of 1923. Section 13 provides for the notification in the District Gazette of the completion of the survey and provides that " unless the survey so notified is modified by a decree of the civil Court under the provisions of section 14 the record of the survey shall be conclusive proof that the boundaries determined and recorded therein have been correctly determined and recorded." Different views have been taken in regard to the scope of the finality postulated. In *Nagaratnam Pillai* v. *Guruswami Pilai*[3], Byers, J., held that it is only the boundaries determined and recorded that are conclusively established and the finality refers therefore to the boundaries and not to the question of title. The learned Judge said : " The meaning of these words is self-evident. . . . . The contention of the learned Advocate-General that the bar imposed by section 14 of the new Act applies only to the correctness of the boundaries and not to questions of title must be upheld." A somewhat different view was taken by Abdur Rahman, J., in *Ponnuswami* v. *Mariappa Servai*[4]. He observed : " It was contended . . . that the Survey Officer might have had the power to determine the boundary . . . or recording it as undisputed, but he had no power to determine the question of title of the plot in dispute. The contention is not sound in my opinion. It may be that if the dispute merely related to the title of the plot in dispute as distinguished from a dispute as to its boundary, the order passed by the Survey Officer would not have become final. But when as a result of the Survey Officer's order or of the decision of the appellate authority from that order, the limit of a person's boundary has been determined and recorded the question of title as to the area falling within that boundary must be in the absence of any claim as to acquisition of title by prescription or otherwise held to have been equally determined as being implicit in that order or decision and would not be liable to attack after the expiry of the period provided under section 14 of the Act for the institution of a civil suit." Thus if the lands are not adjoining each other and if there is no dispute

1. A.I.R. 1947 Bom. 299.
2. (1950) 1 M.L.J. 443.
3. (1943) 2 M.L.J. 311.
4. A.I.R. 1943 Mad. 420.

with reference to the boundaries a pure question of title cannot be decided by the Survey Officer and if for the purpose of the survey he regards one person as the owner that will not be conclusive. But if the two properties adjoin and in the course of survey whether there is boundary dispute or not it becomes necessary to decide the exact boundary line between the two plots such determination involves with it as a matter of logic determination of the title to the disputed portion as well. The matter had also been considered by the Orissa High Court in *Narayana Deo* v. *Venkatappa Rao*[1], where it was held that whether the decision of the survey officer in determining boundaries will affect title to a piece of land lying within the said boundaries would depend very much on the nature of the claim to that land and the questions that fell for decision before him. Thus if the claim to the land were based on the ground that it lay within a particular village belonging to one of the parties and the Survey Officer while determining the boundaries holds that the plot lies in the adjacent village, such determination of the boundary unless set aside by a suit under section 14 will undoubtedly conclude title in respect of the plot. But if the rival claim has nothing to do with the question as to whether the plot lies within the boundary of one village or of the adjacent village it will not entail that result. The view of Abdur Rahman, J., as well as that of the Orissa High Court have found approval in *Krishna Chandra* v. *Ramamurthy Pantulu*[2]. Rajamannar, C.J., said : "We agree with Abdur Rahman, J., that there may be a case in which the result of a boundary fixed by the Survey Officer becoming conclusive under section 13 of the Act may have an indirect effect on the title to an area covered by the boundary. To take a concrete example, if adjacent survey numbers say 1 and 2, belong to two persons *A* and *B* and either after dispute or without any dispute the Survey Officer proceeds to fix the boundary between these two survey numbers 1 and 2, and on doing so he marks the boundary in such a way as to include a portion of what is really survey number 2 as part of survey number 1, it may be that after the lapse of the period specified in section 14 of the Act, *B* the owner of survey number 2 would be precluded from challenging the correctness of the boundary and would virtually lose his title to that part of the survey number belonging to him which had been wrongly included in survey number 1 on account of the wrong boundary fixed by the Survey Officer. It is obvious, however, that strictly speaking, this is not because the Survey Officer has any jurisdiction to determine a question of title. It is the indirect result of fixing the boundary." The learned Chief Justice added that in their opinion a correct construction had been placed on sections 13 and 14 by the Orissa High Court. In the case under notice, a survey officer after demarcating the boundary of a plot of land bearing a survey number gave notice to the registered holders of that number and when they found that more land than what they were legitimately entitled to had been included in that number they kept quiet. The party whose land had been wrongly included in that number was not given any notice. It was held, in the circumstances that the Survey Officer's decision will not be binding upon the real owners of the excess land included in the survey number.

VENKATA RAO *v.* VENKATARATNAM, (1952) 2 M.L.J. 60.

Statutory provision regarding relief to be given in the case of usurious transactions of loan of money is contained in section 3, sub-section 1 of the Usurious Loans Act of 1918. Under that section where the Court has reason to believe (*a*) that the interest is excessive and (*b*) that the transaction was, as between the parties thereto, substantially unfair, the Court may exercise any of the powers specified therein. For the section to apply two conditions should be satisfied. The Court should find (i) the interest excessive and (ii) the transaction substantially unfair. Either circumstance alone will not suffice. In Madras, the provision has been amended by Act VIII of 1937. Under the amended provision the Court if it has reason to believe that the transaction was as between the parties thereto substantially unfair can exercise any of the powers mentioned there. Whereas under the Central enactment the conjunction of two factors was necessary to give relief, under the State legislation the second requirement alone was needed. The

1. I.L.R. (1949) Cuttack 165.
2. (1951) 2 M.L.J. 325.

amending Act also inserted a new Explanation 1 to the effect: "If the interest is excessive, the Court shall presume that the transaction was substantially unfair; but such presumption may be rebutted by proof of special circumstances justifying the rate of interest." Thus it comes to this. If the interest is excessive the Court shall presume the transaction to be substantially unfair and give relief. Whether the interest in any case is excessive or not is necessarily a question of fact. From the decided cases a few rules affording guidance have emerged. In *Samuel* v. *Newbould*[1], apropos of the word 'excessive,' Lord James observed: "What amounts to excessive interest is to be determined by the tribunal in each case; the question of risk being a material matter for consideration . . . . The word 'excessive' applied to interest is, of course, a relative and elastic term impossible of absolute definition. But we know the general rule of interest in commercial transactions and in loans on perfect security . . . . But in respect of ordinary loans deviations from these guides, dependent upon the facts of each case, must doubtless be expected and ought to be allowed. But such deviation must be reasonable in relation to facts." In In re *a Debtor*[2], Cozens-Hardy, L.J., remarked that in considering whether the interest is excessive the Court must have regard to all the circumstances of the case. In *Carringtons, Ltd.* v. *Smith*[3], Channell, J., stated: "There can be no standard rate on personal loans, and where the parties are reasonably on terms of equality a Judge cannot, I think, do better than adopt what they themselves have agreed on, although of course, when that is not the case he has to adjudge what is reasonable as best as he can under the circumstances." This statement was approved by the Court of Appeal in *Reading Trust, Ltd.* v. *Spero*[4]. In the case of secured loans the rate of interest is regarded as excessive if it be extraordinary, such as higher than 10 per cent. or even less, *Part* v. *Bond*[5]. In *Chethambaram Chettiar* v. *Loo Thom Poo*[6], the Privy Council had to consider the question with reference to the Usurious Loans Act—Act IV of 1937 of Malaya. That provision corresponded to section 3 (1) of the Indian Act of 1918. It was held that the charge of 24 per cent. interest per annum should be deemed to be unfair and it was scaled down to 15 per cent. The transaction was one by way of secured debt. In the United Provinces, the Central Act has been amended by the State Act XXIII of 1934 and the Legislature itself has laid down principles on which the excessiveness or otherwise of the interest is to be judged. And it was held in *Lala Ram Narain* v. *Thakur Chandrika Prasad*[7], that all cases coming before the Courts after the passing of the local amending Act must be decided according to the principles laid in the Act. In *Gajraj Singh* v. *Muhammad Mushtaq Ali*[8], which was a case under the Central Act of 1918, 12 per cent. simple interest was held to be a fair, proper and reasonable rate inasmuch as the mortgagor had given ample security for the loan and there were no incumbrances on the property. In *Narasimham* v. *Premayya*[9], it was observed by Horwill, J.: "This Court has frequently held that 9 per cent. is a very liberal remuneration for a secured debt. One has to remember that the times have changed a great deal since some of the decisions relied on were made and rates of interest are now very much lower than what they were a decade or two ago. I am certainly not prepared to say that a creditor suffers hardship because he gets no more than 9 per cent. simple interest on a secured debt." The decision in *Venkataraju* v. *Venkataramana*[10], held that where a mortgage of the year 1922 had stipulated for compound interest at 9 per cent. per annum it was not excessive. It is of interest to note that where a father in a joint Hindu family had made a mortgage of ancestral property carrying compound interest at 36 per cent. per annum with quarterly rests, in *Ram Bhujwan Prasad Singh* v. *Nathu Ram*[11], the Judicial Committee reduced it to simple interest at 1 per cent. per mensem. The nature of interest in the case of simple loans fell to be considered by the Privy Council in *Narain Das* v. *Abinash Chandra*[12], where with reference to an interest of 12 per cent. per annum allowed by the lower Court, Lord Buckmaster

1. (1906) A.C. 461, 473, 475.
2. (1903) 1 K.B. 705, 711 (C.A.).
3. (1906) 1 K.B. 79, 91.
4. (1930) 1 K.B. 492 (C.A.).
5. (1903) 93 L.T. 49.
6. (1940) 1 M.L.J. 68 (P.C.).
7. (1938) I.L.R. 14 Luck. 49.
8. (1933) I.L.R. 56 All. 263.
9. (1945) 1 M.L.J. 219.
10. (1951) 2 M.L.J. 84.
11. (1922) 44 M.L.J. 615: L.R. 50 I.A. 14: I.L.R. 2 Pat. 285 (P.C.).
12. (1922) 44 M.L.J. 728 (P.C.).

said: "The rate is 12 per cent. It appears according to our notions in this country, a high rate of interest, but that has nothing whatever to do with the matter which their Lordships have to consider. It may very well be that having regard to the local conditions in India it is a very proper and reasonable rate to impose, and their Lordships see no reason whatever why any alteration should be made as to the amount." In a case under the Usurious Loans Act of 1918, it was considered in *Ziaul Rahman* v. *Mt. Ganga Dei*[1], that *prima facie* and in the absence of special circumstances 12 per cent. per annum will be a fair and proper rate of interest. In the United Provinces where the amending Act of 1934 had fixed limits within which the Courts can exercise discretion in *Sarsuit Prasad* v. *Lala Baijnath Singh*[2], the learned Judges observed: "We are to be guided by the law as it stands in these provinces at present. The United Provinces Act XXIII of 1934 has fixed limits within which a Court has discretion to hold whether a certain rate of interest is excessive or not. Proviso 3 added by the local Act to section 3 (2) (*b*), Usurious Loans Act of 1918, provides that in the case of unsecured debts, the Court shall deem the interest excessive if the rate exceeds 24 per cent. per annum and proviso 5 lays down that if the rate does not exceed 9 per cent. per annum, the Court shall not deem it to be excessive. If therefore the stipulated rate ranges between 9 per cent. and 24 per cent. the Court has discretion, of course with due regard to all the circumstances, to hold that it is excessive." In *Sevugan Chettiar* v. *Chinnaswami Chettiar*[3], where the note carried interest at 24 per cent., interest at 12 per cent. per annum was awarded. The points that emerge from these decisions are: (i) the term 'excessive' does not admit of being defined absolutely; (ii) whether interest is excessive in any case must be determined with reference to all the circumstances of the case; (iii) the risk involved, the parties having been on reasonable terms of equality, the nature of the times as well as the locality of the debt will be relevant in this behalf; and (iv) in the case of secured debts the rate of interest is excessive if extraordinary, that is, if more than 9 per cent. normally, whereas in the case of simple loans 12 per cent. per annum will be a fair and proper rate. The instant case has taken the view that 12 per cent. simple interest is a proper rate.

VENKATAPERUMAL NAIDU *v.* RATHNASABAPATHI CHETTIAR, (1952) 2 M.L.J. 241.

In regard to the nature of the lien of an unpaid vendor of land different views have been held. While the Madras High Court has been guided by the language of section 55 of the Transfer of Property Act, the Allahabad and Calcutta High Courts have permitted equitable considerations to come in. In *Subrahmanya Ayyar* v. *Poovan*[4], a sale deed had been executed in the plaintiff's favour more than seven years before suit but the purchase money had not been paid and the vendors had continued in possession of the land. In a suit by the plaintiff for a declaration of his right and recovery of possession, it was held that the unpaid vendor's charge on the property sold for the purchase money was a lien which will give him the right to retain possession till the purchase money was paid and the lien was extinguished by such payment. The same view was taken in *Rama Ayyar* v. *Vanamamalai Ayyar*[5]. This conclusion was held to be wrong in *Velayutha Chetti* v. *Govindasami Naicken*[6], where it was pointed out that the unpaid vendor had only a right to retain the title deeds under section 55 (3) and to a charge for the unpaid purchase money under section 55 (4) (*b*) while the vendee was entitled to possession under section 55 (1) (*f*), and, consequently, the vendor cannot retain possession of the property sold against the vendee. When the case was reheard later due to the appellant being dead at the time of the first hearing, the learned Judges laid down[7], that it is not competent to the Courts in a suit for possession by the vendee to pass a decree conditional on the vendee paying the balance of the purchase money and that the provisions of the statute cannot be controlled by equities in favour of the vendor. This view has since then been consistently followed in Madras, *Krishnamma*

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1. A.I.R. 1936 All. 323.
2. (1939) I.L.R. 14 Luck. 464.
3. (1950) 1 M.L.J. 181.
4. (1902) I.L.R. 27 Mad. 28.
5. (1914) 27 I.C. 336.
6. (1907) 17 M.L.J. 400: I.L.R. 30 Mad, 524.
7. (1911) I.L.R. 34 Mad. 543.

v. *Kotipalli Mali*[1], *Poomalai Padayachi* v. *Annamalai Padayachi*[2]. In the last case Somayya, J., held that a vendee who has not paid the purchase money for the lands bought by him is entitled to a decree against the vendor for possession of such lands and the Court cannot make the decree conditional on payment of the purchase money, nor can it decree payment of the price to the defendant in the vendee's suit. In *Baij Nath Singh* v. *Paltu*[3], the Allahabad High Court has held in favour of such a conditional decree being passed. And in *Nilmadhab* v. *Hara Proshad*[4], the Calcutta High Court has held that where the vendor has a lien for the unpaid balance of the purchase money the right of the purchaser to obtain possession under section 55 (1) (*f*) and the right of the vendor to realise the unpaid balance of the purchase money under section 55 (4) (*b*) may be enforced in one suit. In *Baslingava* v. *Chinnava*[5], while recognising the force of the argument founded on the statutory provisions, the Bombay High Court at the same time held itself against a multiplicity of suits for the working out of the rights of parties. Patkar, J., said : "Though I feel difficulty in giving effect to the equitable principle of vendor's lien which is not recognised in the Transfer of Property Act, I do not think there is any insuperable objection to recognise the statutory charge provided in section 55 (4) (*b*), Transfer of Property Act and to incorporate the statutory charge in the decree in the suit brought by the purchaser for recovery of possession ". The instant case has stuck to the view taken in Madras and held that a mortgagee from the vendor would be in no better position than the vendor for this purpose.

UNION OF INDIA *v.* HIRA DEVI, (1952) 2 M.L.J. 265 (S.C.).

In this case the Supreme Court holds that provident fund money being exempt from attachment and inalienable, no execution can lie normally against such a sum and execution cannot be sought against the provident fund money by the appointment of a receiver. Section 60 (1) (*k*) of the Civil Procedure Code exempts from attachment and sale ' compulsory deposits ' and other sums in or derived from any fund to which the Provident Funds Act (XIX of 1925) applies. ' Compulsory deposit ' is defined in section 2 (*a*) of the Provident Funds Act as a subscription to or deposit in a Provident Fund which under the rules of the Fund, is not until the happening of some specified contingency repayable on demand otherwise than for the purpose of payment of premia in respect of a policy of life insurance (or the payment of subscriptions or premia in respect of a family pension fund). Section 3 (1) of the Act provides that such a deposit cannot be assigned or charged and is also not liable to attchment. The prohibition against assignment or attachment of these deposits is based on grounds of public policy. And it stands to reason that where such prohibition is absolute it should not be allowed to be defeated and the deposit reached by a creditor through equitable executiion. That the object of the legislation should not be permitted to be frustrated or circumvented was brought out in *Lucas* v. *Harris*[6]; in the comparable context of section 141 of the Army Act of 1881. Apropos of the question of the appointment of a receiver to collect the pension of an army officer, Lindley, L.J., stated : " In considering whether a receiver of a retired officer's pension ought to be appointed, not only the language but the object of section 141 of the Army Act, 1881, must be looked to ; and the object of the section would, in my opinion, be defeated and not advanced if a receiver were appointed ". Lopes, L.J., observed : " It is beyond dispute that the object of the legislature was to secure for officers . . . . . a provision which would keep them from want and would enable them to retain a respectable social position. I do not see how this object could be effected unless those pensions were made absolutely inalienable, preventing not only the person himself assigning his interest in the pension, but also preventing the pension being seized or attached under a garnishee order, or by an execution or other process of law. Unless protection is given to this extent the object which the Legislature had in view is frustrated, and a strange anomaly would exist. A person with a pension would not be able to utilise his pension to pay a debt beforehand, but immediately his creditor

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1. (1920) 38 M.L.J. 467 : I.L.R. 43 Mad. 712.
2. (1943) 2 M.L.J. 515.
3. (1908) I.L.R. 30 All. 125.
4. (1913) 20 I.C. 325.
5. (1931) I.L.R. 56 Bom. 566.
6. (1886) 18 Q.B.D. 127.

had obtained judgment might be deprived of his pension by attachment, equitable execution or some other legal process. It is impossible to suppose that the Legislature could have intended such an anomaly ". In the teeth of this forceful reasoning no other view seems possible in regard to a compulsory deposit as well. The decision of the Judicial Committee in *Rajendra Narain Singh* v. *Sundara Bibi*[1], however, gave rise to a current of thought that though the property may not be liable to attachment still it could be reached *via* equitable execution. One of two brothers who were parties to a compromise was declared under it to have a right of maintenance in 16 villages enumerated, the right being conferred expressly without power to transfer. A decree-holder sought to proceed against the right of maintenance by having a receiver appointed to realise the rents and profits so that the decretal amount may be paid out of the said realisation as far as possible. It was held it was a fit case for the appointment of a receiver. Lord Shaw observed : " Their Lordships are of opinioon that the right of maintenance is in point of law not attachable and not saleable ; they think that section 60 of the Civil Procedure Code, head (*n*) precludes an application for that purpose. The proper remedy lies in a fitting case, in the appointment of a receiver for realising the rents and profits of the property paying out of the same a sufficient and adequate sum for the maintenance of the judgment-debtor and his family, and applying the balance if any to the liquidation of the judgment-debtor's debt ". In *Nawab Bahadur of Murshidabad* v. *Karnani Industrial Bank, Ltd.*[2], it was held that since the Nawab had a disposing power over the rents and profits assigned to him to maintain his dignity and station, no question of public policy was involved and though the corpus itself was inalienable a receiver of the rents and profits could be appointed. In *Secretary of State* v. *Bai Somi*[3], Beaumont, C.J., distinguished *Rajendra Narain's case*[1] as one proceeding on the finding that the property involved there was not future maintenance and therefore was not made unattachable by the Civil Procedure Code. It was pointed out that if the Privy Council had held that an exempted payment could be reached in execution by the appointment of a receiver the protection afforded by section 60 would become to a great extent lost. In *Dominion of India* v. *Ashutosh Das and others*[4], Roxburgh, J., remarked : " surely it is an improper use of that equitable remedy to employ it to avoid a very definite bar created by statute law to achieving the very object for which the receiver is appointed ". A number of cases had however taken *Rajendra Narain's case*[1] as laying down that though a property may not be attachable a receiver could be appointed in respect of it in execution, *Secretary of State* v. *Venkata Lakshmamma*[5], *Janakinath* v. *Pramatha Nath*[6]. In the decision under examination, the Supreme Court has explained what exactly is the true scope of the decision in *Rajendra's case*[1]. It is observed : " Taking the prayer of the judgment-creditor to be that the right of maintenance be proceeded against, their Lordships observed that the right was in point of law not attachable and not saleable. If it was an assignment of properties for maintenance the amount of which was not fixed, it was open to the judgment-creditor to get a receiver appointed subject to the condition that whatever may remain after making provision for the maintenance of the judgment-debtor should be made available for the satisfaction of the decree debt. The right to maintenance could not be attached or sold. In so far as the decree-holder sought to attach this right and deprive the judgment-debtor of his maintenance, he was not entitled to do so, but where his application for the appointment of a receiver was more comprehensive and sought to get at any remaining income after satisfying the maintenance claim, the appointment of a receiver for the purpose was justified. The decision of the Privy Council does not appear to lay down anything beyond this. In our opinion it is not an authority for the general proposition that even though there is a statutory prohibition against attachment and alienation of a particular species of property, it can be reached by another mode of execution, *viz.*, the appointment of a receiver ". By this decision the law is brought into line with the principles laid down in *Lucas's case*[7].

1. (1925) 49 M.L.J. 244 : L.R. 52 I.A. 262 : I.L.R. 47 All. 385 (P.C.).
2. (1931) 61 M.L.J. 208 : L.R. 58 I.A. 215 (P.C.).
3. (1933) I.L.R. 57 Bom. 507.
4. (1950) 54 Cal.W.N. 254.
5. (1926) 50 M.L.J. 279 : I.L.R. 49 Mad. 567.
6. (1939) 44 Cal.W.N. 266.
7. (1886) 18 Q.B.D. 127.

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NOTES OF RECENT CASES.

Venkatarama Iyer, J. Nagaratna Mudali *v.* Mayandi Venkatesa Mudali.
7th November, 1952. C. R. P. No. 368 of 1952.

Court-fees Act (VII of 1870), *section* 7 (v) *and Article* 17-B—*Suit by coparcener for partition of joint family properties—Some members of the coparcenary adjudicated insolvents —Official Receiver in possession of the properties—Proper Court-fee payable.*

In a suit for partition of family properties by one branch of the joint family and where certain members of the joint family have been adjudicated insolvent and the Official Receiver as representing their interests was authorised to sell the properties the proper Court-fee payable is under Article 17-B of the Court-fees Act and not under section 7 (v). The effect of the insolvency is not to put an end to the joint possession of the coparceners and whatever the rights of the Official Receiver might be, the coparceners must be deemed to be in possession at least constructively of all the joint family properties.

S. Somasundaram and *N. V. Sundaram* for Petitioner.

S. V. Venugopalachari for Respondent.

R.M:

Govinda Menon and *Basheer Ahmed Sayeed, JJ.* Kalyani Achi *v.* K.N.S.P.R.M. Ramanathan Chettiar.
11th November, 1952. A. A. O. No. 369 of 1952 & C.R.P. 1170 of 1952.

Civil Procedure Code (V of 1908), *Order* 21, *rule* 69—*Sale commencing on a specified date and continuing* De die in diem—*If amounts to adjournment—Leave of Court—When necessary—Selling Officer—Agent or delegate of Court—Powers of.*

If an execution sale commenced on a specified date is continued from day to day, it is not a case of an adjourned sale and the sale might be continued for any length of time if the circumstances of the case warrant it. A continuance of a sale is not tantamount to any adjournment.

But where the sale warrant contains a positive direction that the same should be returned on or before a particular date, the selling officer becomes *functus officio* on the expiry of that date and his power to sell gets terminated by efflux of time. Any sale after the expiry of the time fixed for return of warrant is without jurisdiction and there can be no question of any implied extension of time.

A selling officer is not an agent of the Court and he is at best a delegate of the Court. Any action of a delegated authority in excess of such authority is illegal and *ultra vires* and such acts cannot be ratified subsequently by the Court.

R. Gopalaswami Iyengar for Appellant.

A. Sundaram Aiyar for Respondent.

R.M.

Satyanarayana Rao, J. Natesa Sastriar *v.* Sundaram Chettiar.
24th November, 1952. S. A. No. 614 of 1948.

Civil Procedure Code (*V of* 1908), *section* 47—*Decree—Execution—Property vesting in legatees subsequent to attachment—Right of decree-holder to proceed with the execution—Right of suit—When available.*

The rights of an attaching creditor have to be determined as on the date of attachment. The fact that subsequently the property attached has vested under a will upon other persons is of no consequence. Such properties can be validly seized in execution of the decree and the decree-holder need not file a regular suit to enforce his rights.

An heir-at-law though a legal representative within the meaning of section 2 (11), Civil Procedure Code, a decree-holder cannot proceed in execution against the properties of the deceased in the hands of legatees under a will but his claim can be enforced by a suit.

Quaere :—Whether a legatee under a will who helps himself by taking possession of the estate of the deceased in satisfaction of his own legacy is an executor *de son tort* within the meaning of section 303 of the Succession Act? (*vide* illustration to that section).

(1950) 1 M.L.J. 476, doubted.

G. R. Jagadisan for Appellants.

T. R. Srinivasan for Respondents.

R.M.

Rajagopalan, J. Sri Ramulu Naidu *v.* Jambulingam Pillai.
25th November, 1952. A. A. O. No. 299 of 1951.

Limitation Act (*IX of* 1908), *Article* 83—*Applicability—Subsequent mortgagee undertaking to discharge prior mortgage—Failure to—Prior mortgagee bringing the property to sale in execution of the mortgage decree obtained by him—Suit by mortgagor against subsequent mortgagee for damages for breach of covenant undertaking to redeem the prior mortgage—Limitation.*

Where a subsequent mortgagee undertook to discharge a prior encumbrance on a property of the plaintiff but failed to do so as a result of which the property was sold by the prior mortgagee and the plaintiff filed a suit for damages;

Held, that Article 83 of the Limitation Act applies to such cases and the period should be computed from the date on which the sale was confirmed, thus finally extinguishing the right of the plaintiff, as well as the defendant to redeem the mortgage. The damage sustained by the plaintiff was on the final extinction of the right to redeem the mortgage and the extinction is on the date of the confirmation of the sale.

A. Balasubramania Aiyar for Appellant.

K. V. Srinivasa Aiyar for Respondent.

R.M.

Govinda Menon and *Basheer Ahmed Sayeed, JJ.* N.H.M.Pandian, *In re.*
12th December, 1952. Crl. R. C. No. 102 of 1951.
(Cr. R. P. No. 101 of 1951).

Indian Penal Code (*XLV of* 1860), *section* 406—*Dedication of lands to temple—Dedication ceasing to be in force—Spending the income from such lands by successor in interest—If amounts to criminal breach of trust—Dedication—What amounts to.*

A dedication of lands to a temple by a Zamindarini, who is only a limited owner, cannot enure beyond her life-time under section 4 of the Madras Impartible Estates Act II of 1904. The mere fact that the income has been reared even after her life-time as trust property cannot amount to a dedication in favour of the temple. Wrong admissions in ignorance of legal rights have no force. Where the successor in interest spends the income there could be no conviction on a charge of criminal breach of trust as the dedication of the corpus itself is no longer in force.

K. S. Jayarama Iyer and *C. K. Venkatanarasimham* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for State.

R.M.

Raghava Rao, J. Marigamma *v.* Govindappa.
17th September, 1952. S.A. No. 2466 of 1948.

Code of Civil Procedure (Act V of 1908), *Order* 41, *rule* 27—*Appellate Court appointing a second Commissioner to supplement the evidence before the trial Court—Regularity—Section* 107 (2) *and Order* 26, *rule* 9, *Civil Procedure Code, if applicable—Power of appellate Court to appoint a Commissioner.*

The procedure of appointing a second Commissioner at the appellate stage to make an inquiry and submit a report in order to supplement the evidence and to supply a omission before the trial Court, is irregular and is in violation of Order 41, rule 27 of the Civil Procedure Code. It cannot be construed either that the lower appellate Court acted within its powers under Order 26, rule 9, read with section 107 (2) of the Code of Civil Procedure.

Ramachandra Rao for Appellant.

Partl a arathy for Respondent.

R.M.

Chandra Reddi, J. Muthiah Mudali *v.* Munuswami Chettiar (dead) and others
27th October, 1952. S.A. No. 2622 of 1948.

Contract—Agreement for sale of land—Specific Performance of—If completed contract or only an offer which could become a contract by acceptance.

Trust Act (II of 1 82), *section* 94—*Applicability—Limitation.*

An agreement of sale under which the promisor agreed to sell certain lands to the promisee at any time the promisee paid the sale-price is not an executory contract capable of being specifically enforced but is only an offer which could become a contract only by acceptance of that by payment of the price.

But where the whole beneficial interest in the property is not in the promisor and the promisor has admitted that the property was purchased by him only for the benefit of and at the request of the promisee, the suit could be viewed as one for recovering possession of the properties under section 94 of the Indian Trusts Act. The only right of the promisor was to get back the price advanced by him for the purchase of the property for the benefit of the promisee.

In such a case there being no express trust section 10 of the Limitation Act has no application and the residuary article is to be applied.

K. Rajah Iyer for Appellant.

K. S. Desikan for Respondent.

R.M.

Venkatarama Ayyar, J. Anathalayan *v.* Marudamuthu.
7th November, 1952. C.R.P. No. 1427 of 1949.

Civil Procedure Code—Order 9, *rule* 13—*Proviso—(Madras Amendment)—Irregularity in service of summons—If cured—Order* 5, *rule* 17—*Provisions, if mandatory.*

The failure to take an acknowledgment or to affix the summons as contemplated under Order 5, rule 17, Civil Procedure Code, is cured by the proviso to Order 9, rule 13, Civil Procedure Code, enacted in Madras, though the provisions of Order 5, rule 17, may be mandatory. The proviso is intended to apply to all cases in which there has been a failure to observe the provisions as to service of summons under Order 5. If it be proved that the defendant had sufficient notice it will only be an irregularity such as will be cured by the proviso.

C. A. Seshagiri Sastri for Petitioner.

R. Desikan for Respondent.

R.M.

NRC

Panchapagesa Ayyar, J. Papamma, *In re.*
14th November, 1952. Crl. Rev. Nos. 1078 to 1090 of 1952.
(Cas. Ref. Nos. 54 to 66 of 1952.)

Madras Prohibition Act (X of 1937)—Offences under—Practice and Procedure—Section 562 (1), *Criminal Procedure Code (V of 1898), if could be applied—First Offenders—Speculative presumption—Propriety.*

Every court must award the sentence suited to the offence and the offender and not make the sentence smaller because of any doubt regarding the *commission of the offence itself.*

Except under exceptional circumstances to apply section 562 (1), Criminal Procedure Code, to all first offences of drunkenness is neither the intention of the law, nor will it be consistent with common sense. In all such cases the antecedents of the offenders and the circumstances of the offence must be considered *individually.*

It is no part of a court's function to speculate on undetected offences. To presume on no evidence, that a man committing an offence must have committed several offences before which went undetected is not proper.

It is not proper to say that the spread of drink to classes not addicted to it before is to be treated more indulgently than the continuance of drink among the classes addicted to it before. Nor should offenders be left off on the ground of their backwardness.

Public Prosecutor (*V. T. Rangaswami Ayyangar* for State).

R.M.

Ramaswami, J. Annamalai, *In re.*
21st November, 1952. Cr. App. Nos. 92 and 93 of 1951.

Madras Maintenance of Public Order Act, 1949 (*Act XXIII of* 1949)—*If a special law—Special and local laws—Distinction—Madras Act* (*XXIII of* 1949)—*If creates fresh offences—Escape from police custody—When an offence—Arrest without authority or under improper or invalid authority—Resistance to arrest—If offence.*

The word 'offence' means a thing punishable under the Penal Code or any special or local law. The special law contemplated are laws such as those that create fresh offences; *i.e.*, laws making punishable certain things which are not already punishable under the Penal Code. But other Acts are those that create no fresh offences but merely provide a supplementary or alternative punishment of offences already primarily punishable under the Penal Code or which can be dealt with under the preventive or reformative provisions of the Code of Criminal Procedure.

The Madras Act I of 1947 (now Act XXIII of 1949) is not a special law. It can be considered a local law applicable to the State of Madras. A local law does not necessarily include all the rules made under the provisions of a local law. Where a local law declares a breach of the rules made under its authority to be punishable, then a breach of such rules might constitute an offence within the meaning of section 40 of the Penal Code.

A person cannot be convicted of escape unless the custody in which he was detained was lawful. A person about to be arrested is entitled to know under what power the constable is arresting him and if he specifies certain power which the person knows the constable has not got, he is entitled to object to such arrest and escape from custody, such custody not being a lawful one.

A detention and a rescue by others and the escape by the detinue will attract the application of section 225-B, Indian Penal Code, provided the detention was lawful.

Assistant Public Prosecutor (*A. C. Muthanna*) for Appellant.

A. Ramachandran for *Messrs. Row* and *Reddy* for Respondent.

R.M.

Venkatarama Ayyar, J.
10th October, 1952.

Kalavagunta Rama Rao *v.* Kalavagunta Narayanamurthi and others.
S.A. No. 2206 of 1948.

Madras Co-operative Societies Act (*VI of* 1932), *section* 25—*Registrar of Co-operative Societies—If a Civil Court.*

In order to decide whether an authority constituted under a special statute is an administrative body or a tribunal discharging the functions of a judicial character of a Court it is necessary to look into the nature of the powers conferred on the authority by the provisions of the Statute.

The Registrar of Co-operative Societies functioning under the Co-operative Societies Act and the rules made thereunder is a civil Court though the provisions of the Code of Civil Procedure may not apply to it.

Case-law reviewed.

(1949) 1 M.L.J. 107, followed, (1949) 2 M.L.J. 682, distinguished.

Ch. Ramakrishna Rao for Appellant.

B. V. Ramanarasu for Respondent.

R.M. *Appeal dismissed.*

Rajamannar, C.J. and
Venkatarama Ayyar, J.
16th October, 1952.

Kotiah *v.* Raghavulu.
Appeal No. 570 of 1948.

Contract—Specific performance—Vendor's title defective at the time of the contract becoming perfect after the contract—Right of vendor to sue for specific performance.

It is true that a person who has entered into a contract to sell a property as his property cannot compel the purchaser to accept a conveyance of that property from a stranger. But where the vendor has been able to make good his title before the close of the action, he can sue the purchaser for specific performance of the contract even though at the time of the agreement he (the vendor) had no legal or equitable title to it and his title was in any way defective.

It is open to the purchaser if he thought fit, to have declined the contract as soon as he discovered that the plaintiff had no title; but if he does not do so it was sufficient that at the hearing a good title could be made by the vendor.

Wynn v. *Morgan*, 32 E.R. 82, *Eyston* v. *Simonds*, 62 E.R. 1038, *Salisbury* v. *Hatcher*, 63 E.R. 24, *Hoggart* v. *Scott*, 30 E.R. 113, cited, A.I.R. 1937 Mad. 869, foll.

M. S. Ramachandra Rao and *M. Krishna Rao* for Appellants.

D. Munikanniah and *A. V. Subbiah* for Respondent.

R.M. *Appeal allowed.*

Chandra Reddy, J.
29th October, 1952.

Periasami Gounder *v.* Vellama Naicker.
S.A. No. 2061 of 1948.

Madras Estates Land Act (*I of* 1908)—*Section* 107—*Scope of—Limitation for suit to set aside a sale.*

If a junior member of a Hindu joint family happens to be an officer or subordinate officer holding a Revenue sale under the Madras Estates Land Act for recovery of arrears of rent due to landlord and the manager of the joint family purchases the interest sold at the sale, the sale is hit by the provisions of section 107 of the Madras Estates Land Act. It is only voidable, and is valid until set aside. To a suit to set aside the sale Article 12 of the Limitation Act applies.

Case-law discussed.

K. S. Ramamurthi and *V. Seshadri* for Appellant.

V. C. Viraraghavan for Respondent.

R.M.

Raghava Rao, J.
30*th October*, 1952.

The Commissioner, Hindu Religious and Charitable Endowments Board *v.* Gangamma and another.
A.A.O. No. 425 of 1949.

Madras Hindu Religious Endowments Act (*II of* 1927), *section* 9 (12)—*Private institution—When becomes a public temple—Tests.*

A dedication of a private shrine to the public ought not to be readily inferred but its historical background must, when a question of dedication has to be decided, be taken into account.

Seshachalapathi for Appellant.

Kondayya for Respondent.

R.M.

Chandra Reddy, J.
31*st October*, 1952.

Yelliah *v.* Yella Reddi.
S.A. No. 3 of 1948.

Evidence Act (*I of* 1872), *section* 112—*Presumption of legitimacy—Rebuttable—'Access'—Meaning of.*

An 'access' within the meaning of section 112 of the Evidence Act means no more than an opportunity for intercourse at any time when a child could have been begotten. The presumption under section 112 of the Act about the legitimacy of a child is only a rebuttable presumption and the contra can be proved by the person contesting the legitimacy of a child like any other fact under the Evidence Act.

R. Venkatasubba Rao for Appellant.

T. Satyanarayana for Respondent.

R.M.

Chandra Reddy, J.
3*rd November*, 1952.

Anganna Thevan *v.* Ayyasami Thevan.
S.A. No. 1910 of 1948.

Hindu Law—Alienation by mother—Son's debts—Renewal of a time-barred debt—Whether binding on reversioner.

A mother succeeding to the estate of her deceased son is not competent to alienate the property in order to discharge a time-barred debt of her son.

I.L.R. 1926 All. 20 and I.L.R. 43 All. 604 followed.

I.L.R. 16 Pat. 45 doubted.

P. S. Balakrishna Ayyar and *P. S. Ramachandran* for Appellant.

A. Balasubramaniam and *V. S. Mayilerumperumal* for First Respondent.

R.M.

Satyanarayana Rao, J.
4*th November*, 1952.

Narasimhalu *v.* Pappayya.
S.A. No. 2285 of 1948.

Madras Estates Land Act (*I of* 1908)—*Sections* 112 *and* 117—*Provisions mandatory—Failure to conform to the provisions—Effect of on sale.*

The provisions of the Madras Estates Land Act relating to the conduct of sales must be strictly construed whether it is notice under section 112 or notice under section 117 or fixation of the date of sale. These provisions are mandatory and cannot be lightly ignored.

When a selling officer did not conform to these requirements the sale is void and a nullity and not merely voidable and hence Article 12 (*b*) of the Limitation Act cannot apply.

(1940) 1 M.L.J. 20 followed.

(1950) 1 M.L.J. 43 dissented from.

E. Venkatesan for Appellant.

B. V. Subramaniam and the Government Pleader (*P. Satyanarayana Raju*) for Respondents.

R.M. *Appeal dismissed.*

Govinda Menon and Basheer Ahmed Sayeed, JJ.
6*th November,* 1952.

Ayisha Bibi *v.* Sadhakathulla Maracair.
S.A. No. 2063 of 1952.

Mahomedan Law—One co-sharer—If represents other co-sharers.

It is the essence of Islamic Law that a Muslim heir, who becomes a co-sharer does not represent the other co-sharers ; and, if he is in management of the properties belonging to all the co-sharers of whom he happens also to be one the other co-sharers will be entitled to ask for an account of the profits and the relationship between him and the other co-sharers does not become altered by the mere fact that he takes up the management of the estate left by his father.

K. S. Desikan and *K. Raman* for Appellant.

K. Srinivasan for Respondent.

R.M. *Decree modified.*

Rajamannar, C.J. and Venkatarama Ayyar, J.
7*th November,* 1952.

Venkata Chellamma *v.* Subba Rao.
L.P.A. No. 122 of 1950.

Hindu Law—Dancing girls—Adoption of daughter—Custom—Validity and effect.

So far as Madras is concerned an adoption of a daughter by a dancing girl, where it is not for the purpose of prostitution, is valid by custom and such adoption confers on the person adopted the status of an adopted daughter with all the civil rights flowing therefrom like inheritance to the adoptive mother's properties.

Case-law reviewed.

M. S. Ramachandra Rao and *Ch. Ramakrishna Rao* for Appellant.

J. V. Srinivasa Rao for Respondent.

R.M.

Subba Rao and Ramaswami, JJ.
11*th November,* 1952.

Narayana Dossji Varu *v.* Thirumalai Tirupathi Devasthanam Committee.
Appeal No. 651 of 1948.

Civil Procedure Code (VI of 1908), *section* 11—Res judicata—*Might and ought—Waiver of.*

The plea of *res judicata* is not one of jurisdiction of the Court but is one which a party may waive.

If a matter could have been set up as a ground of attack or defence in a former suit and if its introduction into that suit was necessary for a complete and final decision of the right claimed by the plaintiff therein, it will be deemed to be a matter which ought to have been made a ground of attack or defence in that suit, unless the matters in that suit and the subsequent suit are so dissimilar that their union might lead to confusion.

V. M. Ramaswami Mudaliar for Appellant.

K. Sundararajulu Naidu and *P. Rajeswaran* for Respondent.

R.M. *Appeal dismissed.*

Rajamannar, C.J. and Venkatarama Ayyar, J.
17*th November,* 1952.

Appanna *v.* Venkatapadu.
Appeal No. 115 of 1949.

Limitation Act (IX of 1908), *Articles* 91 *and* 144—*Applicability—Suit to set aside a document which is void and inoperative.*

Article 91 of the Limitation Act has no application where the instrument sought to be cancelled is void and inoperative as the article presupposes that a suit is necessary under the law to set aside the instrument. In the case of an invalid instrument which is void there is no need to move the Court to set it aside and only voidable instruments require a decree of Court to set it aside. To such a suit the period of limitation applicable is under Article 144 and not Article 91. If in such a suit there is a prayer for cancellation of the instrument it can only be regarded as ancillary to the substantive prayer for possession and can be treated as a surplusage.

Case-law reviewed.

When a deed of one character is executed on a representation that it is of a different character then it is wholly void and inoperative. Such a deed does not require to be set aside under Article 91 and a suit to recover possession of the properties comprised therein would be governed by Articles 142 and 144 of the Limitation Act.

C. V. Dikshitulu and *N. Rajeswara Rao* for Appellants.

B. V. Subramaniam for 1st Respondent.

R.M. ——— *Appeal allowed.*

Chandra Reddi, J. Rama Krishna Raju *v.* Someswara Rao.
21st November, 1952. W.P. No. 408 of 1952.

Madras Village Panchayat Act (X of 1950), *section* 19—*Applicability.*

Section 19 of the Madras Village Panchayat Act (X of 1950) comes into play only when there is disqualification under sections 13, 15, 16 or 17 of the Act. The jurisdiction conferred by section 19 on the prescribed judicial authority is restricted to cases arising under the four sections mentioned therein.

Whether the procedure laid down in section 19 is retrospective—left open.

R. Bhimasankaram and *T. Narayanachari* for Appellant.

The Government Pleader (*P. Satyanarayana Raju, E. Venkatesan, V. V. Raghavan* and *Ramachandra Raju*) for Respondents.

R.M. ——— *Petition allowed.*

Satyanarayana Rao and Rajagopalan, JJ. Corporation of Madras *v.*
28th November, 1952. Balakrishna Mehta.
C.C.C.A. Nos. 50 of 1951 and 66 of 1950.

Madras Town Planning Act (VII of 1920), *rules* 20 *and* 21—*Betterment contribution —Recovery—Mode of—Distress proceeding—If available to the Corporation after the respective financial year concerned.*

A demand for payment of betterment contribution could be made by the Corporation (or a Municipality) either in the half year in which it became due or in the succeeding half year only for the amount due in respect of the first half-year. There is no right to demand under rule 20 betterment contribution due in respect of any other half year and half years other than one half year in respect of which it became due in that half year.

Hence betterment contribution due in respect of several years cannot be recovered by distraint proceedings after the expiry of the concerned financial year.

R. Rajeswara Rao and *R. Punna Rao* for Appellant in C.C.C. App. No. 66/50.

V. K. John of Messrs. John and Row for respondent in C.C.C. App. 66/50 and Appellant in C.C.C. App. 50 of 1951.

G. Venkatesayya for Respondents in C.C.C. App. No. 50 of 1951.

R.M. ———

Mack, J. Panchalamma *v.* Subramaniah.
5th December, 1952. C.R.P. No. 513 of 1951.

Provincial Small Cause Courts Act (IX of 1887), *section* 15 *and schedule II—Suit of a small cause nature—Test.*

A suit by a vendor to recover the purchase money or any balance alleged to be due on a sale of immoveable property falls within the category of a suit for specific performance. Hence it is not of a small cause nature. (1943) 2 M.L.J. 424 (F.B.) relied on.

R. Venkatasubba Rao for Petitioner.

K. Subbaramiah, V. Sreeramulu and *K. Subramanian* for Respondents.

R.M. ——— *Revision allowed.*

Ramaswami, J.
9th December, 1952.

Ayya Nadar, *In re.*
C.R.P. No. 2228 of 1952.

Civil Procedure Code (V of 1908), *section* 11, *Explanation IV*—Res judicata—*Might and ought.*

There can be no doubt that the plea of ' might and ought ' cannot be extended to the extent of compelling a litigant to set up incongruous pleas in order to exhaust all the possible permutations and combinations of attacks or defences which might be evolved. If a matter could have been set up as a ground of attack or defence in a former suit *and if* its introduction into that suit was *necessary* for a complete and final decision of the right claimed by the plaintiff therein, it will be deemed to be a matter which *ought* to have been made a ground of attack or defence in that suit. It cannot be said of any matter that it *ought* to have been set up as a ground in a former suit, if its introduction would have been *incongruous* to the matter of that suit.

P. S. Chandrasekara Ayyar and *P. S. Ramachandran* for Petitioner.

R.M. *Petition dismissed.*

Subba Rao, J.
10*th December*, 1952.

Thirugnanasambandam Pillai *v.* Ramachandran Pillai.
S.A. No. 510 of 1949.

Civil Procedure Code (V of 1908), *section* 92—*Suit by Managing Trustee against other trustees for accounts—Sanction of Advocate-General—Necessity.*

A suit by one Managing Trustee for rendition of accounts against the other trustees during the period of his term would be maintainable without the sanction of the Advocate-General.

S. Sitarama Aiyar and *S. Rajaraman* for Appellant.

K. Venkataramani for Respondent.

R.M. *Appeal allowed.*

Ramaswami, J.
10*th December*, 1952.

Narayanamurthi Amma, *In re.*
C.R.P. No. 2074 of 1952.

Inam—Swasthivachakam Service Inam—Nature of —Alienability.

A Swasthivachakam Service Inam is inalienable and an agreement to sell such an inam, which is invalid, cannot be rendered any more valid by disguising it as a long term lease or a mortgage for an extended period. The purchaser of a Swasthivachakam Inam runs the double risk of the Collector resuming the land and regranting it and the successor in office of the service to be performed or the general body of worshippers stepping in to avert such a resumption by getting the alienation declared void and recovering possession, profits and costs.

(1922) I.L.R. 45 Mad. 620 : 42 M.L.J. 477, followed and case-law discussed.

C. V. Dikshitulu for Petitioner.

R.M.

Govinda Menon, J.
12*th December*, 1952.

Doraiswami Nadar *v.* Nataraja Nadar.
C.R.P. Nos. 1255 and 1256 of 1952.

Civil Procedure Code (V of 1908), *Order* 6, *rule* 17—*Amendment of plaint—When permissible.*

An amendment of a plaint by adding a prayer to the effect that a plaintiff sues not only on his own behalf but also on behalf of the entire body of creditors of the defendant can be allowed. (1943) 2 M.L.J. 1, followed. I.L.R. (1940) Mad. 808 : (1940) 1 M.L.J. 872, distinguished.

D. Ramaswami Aiyangar and *P. R. Varadarajan* for Petitioners.

C. S. Swaminathan for Respondents.

R.M. *Petition allowed.*

Govinda Menon and Basheer Ahmed Sayeed, JJ.
12th December, 1952.

Sinambu, *In re* :
Crl. Appeal No. 416 of 1952.

Criminal Trial—Criminal Rules of Practice, Rule 85*—Confession of accused—Failure to warn—Admissibility in evidence—Practice—Warning—When compulsory.*

As a general rule of practice where there are more than one person charged with a crime and one of such persons wants to make a confession statement, it is the duty of the magistrate to specifically warn the person making the confession that it was not intended to take him or her as an approver. But where it is quite clear from the circumstances that only one person is involved in the crime and such a person wants to confess, the failure to warn the person regarding the fact that it was not intended to take him as an approver would not amount to a serious irregularity.

B. Prasada Rao for Appellant.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

R.M. *Sentence modified.*

Chandra Reddy, J.
15*th December*, 1952.

Narayanan *v.* Central Road Traffic Board.
W.P. No. 744 of 1952.

Motor Vehicles Act (IV of 1939)*—Central Road Traffic Board—Powers of remand.*

The Central Road Traffic Board's powers in the matter of remand are untrammelled by any of the provisions of the Civil Procedure Code and they can limit the scope of the order of remand.

K. Rajah Ayyar and *B. Manawala Chowdry* for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*), *N. V. B. Sankara Rao* and *Punyakoti Chettiar* for Respondent.

R.M. *Petition dismissed.*

Mack, J.
17*th December*, 1952.

Danapal Chetty *v.* Rajagopal Chetty.
A. A. O. Nos. 195 and 196 of 1949.

Suits Valuation Act (VII of 1887), *section* 11*—Scope and effect—Objection to pecuniary jurisdiction taken for first time on appeal—If appellate Court can return plaint for presentation to proper Court.*

An appellate Court cannot direct a plaint to be returned to the party for presentation to the Court having jurisdiction when no objection to jurisdiction had been taken during the trial and when lack of jurisdiction was found to result from a mere under-valuation in the plaint. Under proviso B to section 11 of the Suits Valuation Act, this course can only be adopted when the under-valuation or over-valuation has, in the opinion of the appellate Court, prejudicially affected the disposal of the suit on its merits. Where objection to jurisdiction on the ground of under-valuation was not taken in the trial Court the appellate Court cannot return the plaint but has to hear the appeal on its merits and dispose of it according to law.

M. Natesan for Appellant.

V. Somasundaram and the Government Pleader (*P. Satyanarayana Raju*) for Respondents.

K.S. *Order of remand set aside.*
Leave to appeal refused.

[F.B.]

Satyanarayana Rao, Subba Rao and Ramaswami, JJ.
5th November, 1952.

The Juma Masjid, Marcara *v.* Deviah.
Appeal No. 852 of 1948.

Transfer of Property Act (IV of 1882), *section* 43—*Scope of—If applies to cases of alienation prohibited by section* 6 (a) *of the Act—Conditions to attract section* 43 *to transfers.*

Where a transferor in fact purports to transfer an expectancy or property which he had no right to transfer without making any representation that he had authority to transfer, then section 43 of the Transfer of Property Act will not help the transferee. Similarly, if both the transferor and transferee knew the truth, the section cannot be invoked by the transferee. Section 43 proceeds on the fundamental assumption that an erroneous or fraudulent representation by a transferor induced the transferee to part with the consideration without knowing the true facts and therefore such a transferee should be allowed to claim from the transferor; if he subsequently acquires any title to the property, that the transfer should operate on that title.

A transfer which was made on an erroneous representation may, in fact and in effect, be a transfer of an expectancy, which is prohibited by the Statute. That does not prevent section 43 from operating in such cases. 65 M.L.J. 588, overruled. 29 M.L.J. 733, approved.

Per Subba Rao, J.—The mere fact that the subject-matter of the transfer is untransferable by reason of some statutory restriction or principles of public policy cannot take the case out of the operation of section 43, Transfer of Property Act. The want of title or a prohibition against transfer in a property affects the title purported to be conveyed. In either case, the transferee does not acquire title but that does not affect the competency of the transferor. The case of a transfer by a person legally competent to transfer is different from the case of a person not legally competent to transfer. In the former case the transferor is bound to make good his representation and in the latter his representation itself cannot bind him as he has no legal competency. If this distinction is borne in mind it is possible to reconcile the provision of section 43 and section 6 (*a*) of the Transfer of Property Act.

T. Krishna Rao for Appellant.

K. Rajah Aiyar and *V. Seshadri* for Respondents.

R.M. *Appeal dismissed.*

Rajagopalan, J.
18th November, 1952.

Kesava Rao *v.* Subbayya.
S. A. Nos. 2092 and 2093 of 1948.

Contract—Principal and agent—Agent receiving money of principal—Liability to pay interest—When arises.

An agent is not generally liable to pay interest upon money received by him for the use of his principal except where he refused to pay it over to the principal on demand.

When a defendant as an agent of the plaintiff improperly withheld accounts from the plaintiff it should suffice to make the defendant liable for interest from the date of demand for accounts and payment by the plaintiff.

P. Somasundaram and *A. Sambasiva Rao* for Appellants.

N. V. B. Sankara Rao and *K. Rayanna* for Respondents.

R.M. *Appeal dismissed.—Leave granted.*

Rajamannar, C.J. and Venkatarama Aiyar, J.
18th November, 1952.

Annapurnamma *v.* Collector of Vishakapatnam.
Appeal Nos. 34, 35 and 36 of 1949.

Civil Procedure Code (V of 1908), *section* 92—*Scope.*

It is not necessary that a suit for administration should always precede a suit under section 92 of the Civil Procedure Code.

I.L.R. 46 Mad. 300, followed. 16 L.W. 922, considered.

P. Somasundaram for Appellant.

The Government Pleader (*P. Satyanarayana Raju*) and *V. Balakrishna Eradi* for Respondent.

R.M. — *Scheme modified. Appeal dismissed.*

Subba Rao and Ramaswami, JJ. Danalakshmi Ammal *v.* Pichchayya Naidu.
25th November, 1952. Appeal No. 203 of 1949.

Deed—Construction of—Power to adopt with words of bequest—Nature of—When a will.

A document is a will if it contains specific words of bequest to come into effect after the death of the testator. If there are specific words of devise it is not permissible to ignore them. It may be in some cases that the alleged words of devise are ambiguous and are consistent with a narrative and a declaration of the consequences of adoption. In such cases, having regard to the context, a Court may hold that the document only conferred a power of authority to the widow and the ambiguous words of devise are only a statement of the legal consequences of an adoption. For the purpose of construction of a document the validity of the will or its clauses must be ignored.

V. Sundaresan for Appellant.

S. V. Rama Aiyangar for Respondent.

R.M. —

Satyanarayana Rao, J. Pavanasam Chettiar *v.* Palavesam Chettiar.
27th November, 1952. S.A. No. 23 of 1949.

Hindu Law—Adoption—Proof of—Tests.

In cases of ancient adoption one has to rely upon the course of conduct of the parties rather than on any amount of oral evidence. 53 M.L.J. 858 (P.C.), followed. The fact that the adopted son is excluded from a share in the properties of his natural family at the time of the partition is a very strong circumstance. Dearth of evidence should not be allowed to tell against the truth of an adoption, several decades old where there is practically a consistent course of conduct which is consistent only with the fact of an adoption.

S. Rajagopalachari for Appellant.

S. Ramachandra Ayyar for Respondent.

R.M. — *Appeal allowed.*

Satyanarayana Rao, J. Appaswami Reddiar *v.* Krishna Reddiar.
4th December, 1952. S.A. No. 599 of 1949.

Hindu Law—Joint family—Partition—Purchasers of certain shares—Rights—Common well—Right to use the water.

Where a well is excavated on an ancestral land as a source of irrigation to particular lands, after partition of the lands, as incident to the ownership of the lands, the right to the use of the well also is vested in the various sharers. Whether the sales by these sharers are effected with or without reference to the right in the well, the right to take water from the well, which is attached as incident to that property, will pass to the purchaser.

M. S. Venkatarama Aiyar for Appellant.

S. Thyagaraja Aiyar for 1st Respondent.

R.M. — *Appeal allowed.*

Rajamannar, C.J. and Venkatarama Aiyar, J. Komti Achan *v.* Velayudhan.
5th December, 1952. Appeal No. 180 of 1949.

Trusts Act (II of 1882), section 90—Applicability.

A purchase by a mortgagee based on a breach of obligation by him must in equity enure for the benefit of the mortgagors and it makes no difference in the enforcement of this equity that the mortgagor is also a party to the decree under

which the sale is held. If there is a deliberate breach of obligation contained in the deed resulting in the sale of the properties and the purchase is made by the defaulting mortgagee the equity under section 90 of the Trusts Act will fasten upon the property in his hands.

Case-law reviewed.

D. A. Krishna Variar and *A. Vasudeva Menon* for Appellants.

N. Sundara Aiyar for 1st Respondent.

R.M. ——— *Appeal allowed.*

Chandra Reddi, J. Sri Meenambigai Motor Service *v.* State of Madras.
10*th December*, 1952. Writ Petition No. 687 of 1952.

Motor Vehicles Act (IV of 1939), *section* 64-*A—Government exercising revisional jurisdiction—Necessity to hear parties.*

The only obligation cast upon the Tribunals exercising statutory functions and acting in a *quasi-judicial capacity* is to give an opportunity to the parties to present their cases before a final decision is reached by the authorities concerned. It is not necessary for administrative bodies, though acting in a *quasi-judicial capacity*, to hear the parties in person.

Messrs. John and Row for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*), *T. Chengalvarayan*, *N. Rajagopala Aiyangar* and *K. Thirumalai* for Respondents.

R.M. ——— *Petition dismissed*

Ramaswami, J. Muthyala Lakshminarayana, *In re.*
10*th December*, 1952. S.A. No. 2384 of 1952.

Madras Estates Land Act (I of 1908)—*Sub-tenant—When can acquire right of occupancy.*

Unlike the Bengal Tenancy Act, the Madras Estates Land Act does not recognise the acquisition of occupancy right by sub-lessee tenants. But a sub-lessee or sub-tenant from a ryot can by custom or usage acquire occupancy right.

Y. Suryanarayana for Appellant.

R.M. ——— *Appeal not admitted.*

Ramaswami, J. Moosakutty, *In re.*
16*th December*, 1952. C.R.P. No. 2363 of 1952.

Civil Procedure Code (V of 1908), *Order* 26, *rules* 9 *and* 18—*Commissioner—Appointment of—Notice to other side if compulsory before appointment.*

There is no provision under Order 26, rule 9, Civil Procedure Code, that a commission could be issued only after notice has been issued to the defendant and rule 18 cannot mean that notice to the parties is necessary before issuing a commission. 40 L.W. 358, dissented from.

The Commissioner's report in such cases though it is undoubtedly part of the records in the case, does not automatically become evidence and the parties are entitled to object to the Commissioner's report and prove their objections by examining the Commissioner or other witnesses.

K. P. Ramakrishna Aiyar for Petitioner.

R.M. ——— *Revision not admitted.*

Govinda Menon and Basheer Ahmed Sayeed, JJ. Loomchand Sait *v.* The Official Liquidators, Peerdhan Joharmall Bank, Ltd.
17*th December*, 1952. O.S.A. No. 88 of 1951.

Companies Act (VII of 1913), *section* 282 (*A*) *and section* 179 (*A*)—*Sanction of Court to institute proceedings against defaulting Director by Official Liquidators—When necessary—Constitution of India, Article* 20 (2)—*If violated.*

Banking Companies Act (X of 1949), *section* 45-*C and section* 45-*G—Powers of Court.*

It is not necessary that previous sanction of Court should be obtained by the Official Liquidators for instituting criminal proceedings against a defaulting mana-

ging director. In the absence of specific terms that sanction should be previously obtained, it follows, as a necessary corollary, that the sanction required by the Official Liquidators could be given by the Court at any time, even after the proceedings have actually been instituted or even in the course of the proceedings.

Non-compliance with formal requirements in the matter of the description of the applicants cannot and will not amount to any violation of section 177 of the Companies Act, where there is substantial compliance with its provisions.

Section 282-A of the Companies Act does not offend against Article 20 (2) of the Constitution of India.

Failure to frame rules under section 45-G of the Banking Companies Act does not vitiate any proceedings taken under the Act as per the Original Side Rules or the Companies Act and the rules framed thereunder.

Under section 45-C of the Banking Companies Act the High Court is the proper and competent Court and not the Presidency Magistrate's Court to try offences under the Act even though the trial is in a summary way.

The Judge dealing with the proceedings for the winding up of the Banking Company is also competent to try any offence against the defaulting director.

D. Suryaprakasa Rao and *T. K. Raman Nambisan* for Appellant.

A. Balasubramanian for Respondent.

R.M. ——— *Appeal dismissed.*

Mack, J. Pethayya Pillai *v.* Karuppiah Nadar.
17th December, 1952. A.A.O. No. 571 of 1949.

Oaths Act (X of 1873), section 8—Oaths of extraordinary kind—Validity.

Section 8 of the Oaths Act specifically requires that the oath should be one not purporting to affect any third person. Extraordinary oaths, taken on challenge, like taking an oath on the head of the person's son, is contrary to section 8 and is not valid or binding.

A.I.R. 1925 All. 604 and I.L.R. 18 All. 46, referred to. (1938) 1 M.L.J. 368, distinguished.

S. V. Venugopalachari and S. Venkatesan for Appellant.

C. K. Viswanatha Aiyar and *Messrs. Sundararajan* and *Sivaswami* for Respondents.

R.M. ———

Krishnaswami Nayudu, J. Ramalingamma *v.* Venkatasubbayya.
17th December, 1952. A.A.O. No. 434 of 1949.

Madras Hereditary Village Offices Act (III of 1895), section 13 (1) and section 21—Suit for recovery of service inam lands—Jurisdiction of Civil Court—Suit if of civil nature.

The suits contemplated under section 13 of the Madras Hereditary Village Offices Act as being entertainable by the Collector are suits relating to the succession to an office, to hold such office and to enjoy such emoluments. There can be no doubt that emoluments under section 13 include also lands.

Sections 13 and 21 must be read together and the classes of suits that are not cognizable by the civil courts are only those which are mentioned in section 13 (1) and which are to be filed in the Revenue Court.

Case-law reviewed.

B. V. Ramanarasu for Appellant.

Neti Subramanyam and *J. V. Krishna Sarma* for Respondent.

R.M. ——— *Appeal allowed.*

Ramaswami, J. Korapalu Heggadthi *v.* Shivarama Hegde.
17th December, 1952. S.A. No. 794 of 1949.

Malabar Law—Ejman or karnavan of a tarwad—Powers of—Grant of mulgani lease—Acts of management or alienation—Tests of validity.

In the absence of necessity the karnavan cannot ordinarily grant a mercharth or renew an old kanom, long in advance of the expiry of the prior term. But such transactions are only voidable and not void. The test prescribed in regard to the act of management is whether the karnavan acted *bona fide* and one test for an act of alienation is whether there was necessity or benefit to the estate. In the former role his powers approximate to that of a trustee or of guardian and in the latter role to that of manager of joint family.

Case-law discussed.

Observations in Justice Sundara Iyer's Treatise on Malabar and Aliyasanthana Law and Mayne's Hindu Law approved.

M. K. Nambiar for Appellant.

S. V. Ramayya Nayak for Respondents.

R.M. *Appeal dismissed.*

Venkatarama Ayyar, J. The District Board, Salem, by its President
17th December, 1952. *v.* Hanumantha Rao.
C.R.P. No. 1081 of 1950.

Madras Local Boards Act (*XIV of* 1920), *section* 60—*Vesting of public road—If vests the trees standing thereon.*

The vesting of a street in a District Board under the Madras Local Boards Act does not carry with it the ownership of the trees standing thereon, though the Board may have large powers of control over it. It could not be contended that under section 60 of the Act what vests in the local authority is not merely the road-way portion but the lands adjacent thereto and that such lands include the trees standing thereon.

Case-law discussed.

S. Ramachandra Aiyar for Petitioner.

D. Ramaswami Aiyangar and *P. R. Varadarajan* for Respondent.

R.M. *Revision allowed: suit remanded.*

Ramaswami, J. Velur Devasthanam *v.* Muthia Pallavarayar.
5th January, 1953. Crl. Rev. Cas. Nos. 582 and 583 of 1952.

Criminal Procedure Code (*V of* 1898), *section* 145—*Power of Sub-Divisional Magistrate to drop the proceedings under—Stay by High Court in revision—Scope—Powers in revision.*

Proceedings under section 145, Criminal Procedure Code, can be terminated at any stage when the Magistrate for valid and adequate reasons considers that there is no likelihood of the breach of the peace. Such reasons must, however, be apparent on the face of the record.

The High Court can set aside an order of the Magistrate if it offends against the elementary rule founded on the desire of the Courts to place the parties to a proceeding on a footing of absolute equality. As a necessary implication to the power of setting aside, the High Court can also order stay before further mischief is effected.

The High Court will however interfere in revision with orders under section 145 and section 146, Criminal Procedure Code, only under exceptional circumstances and that too only when no discretion has been exercised or when that discretion was wrongly exercised.

There must appear on the face of the judgment or of the order complained of or on the record some ground—which need not always be a ground of law—to induce the High Court to think that the evidence ought to be examined in order to see whether there has been miscarriage of justice.

Where a Magistrate drops proceedings he must show reasons *ex facie* and though those orders need not be written elaborately like a judgment still they should follow

the pattern of judgments to enable the revising authority to find out whether the lower Court has applied its mind to the point and came to its conclusion for valid and adequate reasons.

T. S. Kuppuswami Aiyar for Petitioner.

K. Kalyanasundaram for Respondents.

R. Santhanam for the Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

R.M. ——— *Order set aside.*

Ramaswami, J. *In re* Raghunatha Vannian.
8th January, 1953. Crl. Appeal No. 100 of 1951.

Criminal trial—Identification proceedings—Whether evidence—Admissibility—Accused if can demand an identification parade—Evidence Act, section 9.

There is no section in the Evidence Act which makes the identification proceedings evidence at all. But under section 9 of the Evidence Act the evidence of the identification proceedings are facts which establish the identity of the accused persons and are themselves relevant.

There is no provision in the Criminal Procedure Code which entitles an accused to demand that an identification parade should be held at or before the enquiry or at the trial. An identification parade belongs to the stage of investigation by the police. Identification parades are held not for the purpose of giving defence advocates material to work on, but in order to satisfy the investigating officer of the *bona fides* of the prosecution witnesses. The evidence as to identification ought in each case to be subjected to a close and careful scrutiny.

K. S. Naidu for Appellant.

R. Santhanam for Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

R.M.

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Raghava Rao, J. Balakrishna Mudaliar *v.* Srinivasalu Chetti.
8th January, 1953. C.R.P. No. 2014 of 1952.

Madras Buildings (Lease and Rent Control) Act, 1949 (*as amended by Act VIII of* 1951), *section* 7 (2) (vi) *proviso—Applicability, section* 12-*B—Revisional powers of High Court—Limits.*

Before the amended provision of the Madras Buildings (Lease and Rent Control) Act could be put into force, it is necessary that the Rent Controller must be moved in express terms by the defaulting tenant to consider the question of his default as not being wilful. It is only then that the Rent Controller could be held to be satisfied or not satisfied as to whether the delay was wilful or was not wilful.

The power which the High Court is called upon to exercise is not an appellate jurisdiction but revisional so that where the tenant has not asked for the indulgence provided for by the statute, the Rent Controller cannot be found to be in error in not holding the default in question to be not wilful. Nor can the Small Cause Court, which later on deals with the matter, be held to be wrong in not entertaining the point, if for the first time sought to be raised before it.

The indulgence created by the amending Act is not a matter of right which could be claimed as a matter of course by the defaulting tenant. It is an indulgence to be exercised in favour of the litigant only on the Rent Controller being satisfied in the manner provided by the amendment of the statute.

Quære :—Whether the terms of section 115, Civil Procedure Code and the terms of section 12-B of Madras Act XXV of 1949 are not *ad idem* and whether the powers under section 12-B are wider than under section 115, Civil Procedure Code ?

V. M. Ramaswami Mudaliar, N. Gopala Menon and *P. K. Janakiram* for Petitioner.

R. Mathrubutham for Respondent.

R.M. ——— *Revision dismissed.*

Govinda Menon, J. Venkateswara Rao *v.* Mohd. Mohibulla Sahib.
9th January, 1953. C.R.P. No. 1495 of 1951.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *sections* 5 *and* 6—*Applicability.*

The provisions of sections 5 and 6 of the Madras Buildings (Lease and Rent Control) Act, 1946 (now Act XXV of 1949) are peremptory and will apply even though the parties have contracted to the contrary. An increase in rent is permissible only under section 6 of the Act and not otherwise, whether or not fair rent is fixed by Court. Any agreement to the contrary is not valid. (*See* now sections 5 and 5-A of the Act). (1948) 1 M.L.J. 51, followed.

I. Vishnu Rao for Petitioner.

Ch. Sankara Sastri for Respondent.

R.M. ——— *Revision allowed.*

Ramaswami, J. Public Prosecutor *v.* Pattu Narasimhalu.
12th January, 1953. Crl. Appeal No. 378 of 1952.

Madras Prevention of Adulteration Act (III of 1918), *section* 5 (*d*)—*Rules*—*Scope.*

A person who is working in a shop on behalf of the owner as his employee is certainly one who will come within the meaning of " person offering for sale " the article exhibited there.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

G. Gopalaswami for Accused.

R.M. ——— *Appeal allowed.*

Ramaswami, J. Public Prosecutor *v.* Sari Setty Venkatasubbiah.
12th January, 1953. Crl. Appeal No. 384 of 1952.

Madras General Sales Tax Act (IX of 1939), *section* 15 (b) *and section* 16-A—*Commission agent*—*If liable to be punished for non-payment of tax.*

The term ' dealer ' will take in a commission agent also in certain cases and he will be an assessee falling within the scope of the Act and non-payment of tax by such a person will entail a punishment under section 15 (*b*) of the Act.

(1952) 1 M.L.J. 494 (F.B.), followed.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

Accused not represented.

R.M. ——— *Appeal allowed.*

Ramaswami, J. Public Prosecutor *v.* K. V. R. Annamalai Chettiar.
15th January, 1953. Crl. Appeal No. 379 of 1952.

Madras Prevention of Adulteration Act (III of 1918), *section* 6 (3)—*Employee's Acts*—*When employer could escape conviction.*

Under the Prevention of Adulteration Act, section 6 (3), if a master of a shop has been able to show that he had used due diligence to enforce execution of the Act and what was done was without his knowledge, consent or connivance, he has got to be acquitted.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for Appellant (in person).

N. S. Mani for Respondent.

R.M. ———

Govinda Menon and Basheer Ahmed Sayeed, JJ. Ramanathan *v.* Chinna
16th January, 1953. Nanjunda Goundan.
A. A. O. No. 525 of 1952.

Civil Procedure Code (V of 1908), *Order* 21, *rules* 2 *and* 35—*Decree for possession of immoveable property*—*Satisfaction of decree*—*How effected*—*Order of Court recording satisfaction*—*Necessity.*

When once a decree-holder by means of a certificate in a money decree informs the Court that he has received satisfaction of the amounts due under the decree,

then despite the fact that the Court has not bestowed its thought and put its seal of such satisfaction as being recorded, it will not be permissible to allow the decree-holder later on to execute the decree on the ground that the Court has not recorded satisfaction of the decree.

(1918) M.W.N. 507 and 98 I.C. 698, followed. (1947) 1 M.L.J. 270, distinguished.

Order 21, rule 2, Civil Procedure Code, does not apply to cases where there are other reliefs than the payment of money.

I.L.R. 49 Mad. 716, followed.

There is no provision for recording satisfaction of a decree for delivery of property except under Order 21, rule 35, Civil Procedure Code and that will come into force only where the Court has ordered delivery by a warrant issued to the bailiff and if such a procedure has not been followed it is open to the decree-holder to apply to the Court for putting him in possession of the property.

Case-law discussed.

C. A. Vaidyalingam, G. R. Jagadisan and *A. N. Nanjappa* for Appellant.

T. M. Krishnaswamy Aiyar, K. S. Champakesa Ayyangar, S. Thyagaraja Aiyar and *N. Vanchinathan* for Respondent.

R.M. ——— *Appeal dismissed.*

Rajamannar, C.J. and Venkatarama Aiyar, J.
21st January, 1953.

The Vishakapatnam Co-operative Motor Transport, Ltd. *v.* Bangaru Raju.
L.P. As. Nos. 6, 52 and 146 of 1952.

Motor Vehicles Act (IV of 1939), *section* 44 (2)—*District Collector* ex-officio *president of a co-operative society—Society applying for permit—Membership of R.T.A.—Validity of orders.*

The District Collector of a District is not disqualified from being appointed as a member of the Regional Transport Authority under section 44 (2) of the Motor Vehicles Act merely because he happens to be the *ex-officio* president of a co-operative society, which applied for issue of a bus permit.

One of the great principles of civilized jurisprudence which is a part of the law in Britain and which has been adopted in this country is that no man shall be a Judge in his own cause. Closely allied to this principle is the other salutary principle that it is of fundamental importance that justice should not only be done but manifestly and undoubtedly seem to be done. The combined result of these two well-established principles is that irrespective of the possibility or otherwise of actual partiality being proved, the constitution of a tribunal entrusted with judicial or quasi-judicial functions is deemed to be bad if and when it deals with any case in which it can be said that one of the members of that body is among the suitors or litigants before the body. (Halsbury's Laws of England, 2nd Edn., Vol. IX, p. 883, *et seq.*) A.I.R. 1952 All. 74 and (1953) S.C.J. 31, distinguished.

The Government Pleader (*P. Satyanarayana Raju*) for Appellant in L.P.A. No. 52 of 1952 and Respondent in L.P.A. Nos. 6 and 146 of 1952.

D. V. Reddi Pantulu and *U. Somasundaram* for Appellant in L.P.A. Nos. 6 and 146 of 1952.

The Advocate-General (*V. K. Thiruvenkatachari*), *M. K. Nambiar, C. F. Louis, N. Sundaram Aiyar, D. Narasaraju, K. B. Krishnamoorthy, K. Mangachari, T. K. Rajagopalan* and *S. S. Rajagopalan* for Respondents.

R.M. ——— *Appeals dismissed.*

Subba Rao, J. Sanyasappanna *v.* Appalaswami.
18*th November*, 1952. A.A.O. No. 122 of 1951.

Madras Agriculturists Relief Act (*IV of* 1938), *section* 9-A (7)—*Scope of.*

To get an exemption under section 9-A (7) of the Madras Agriculturists Relief Act a person should have acquired a title to the equity of redemption by a transfer *inter vivos* from another person who in his turn acquired a right to the same by one of the modes mentioned, namely, succession, survivorship, court-sale, etc. The transaction to be hit by the section should have been a transfer *inter vivos* from the original mortgagor between the two dates mentioned. The clause would not apply if the transfer effected between the dates is from a transferee from the original mortgagor prior to 30th September, 1937.

E. Venkatesam and *E. L. Baghiratha Rao* for Appellant.

C. V. Dikshitulu for Respondent.

R.M.

Mack and Krishnaswami Nayudu, JJ. Venkataramayya *v.* Venkataramappa.
25*th November*, 1952. Appeal No. 20 of 1949.

Hindu Law—Joint family—Individual business of a member—Gains of—Adequate nucleus—What is.

If a member of a Hindu joint family who was given a certain sum from the joint family funds and who goes out of the family in the sense of leaving the family house and starts a business of his own individually or in partnership and by virtue of his exertions he prospers in his business and acquires properties it will not be justifiable to hold that either the business or his properties would be joint family properties. The trend of judicial opinion has been as far as possible to recognise properties acquired out of the individual exertions of a member of a joint family to be his self-acquisition.

If a member of the family is inclined to start a trade and for that purpose he gets assistance by way of a contribution from the joint family funds without any further assistance from the joint family and goes and starts a business and acquires properties it is reasonable to extend the principle of Hindu Gains of Learning Act (XXX of 1930) to such a case. There is no real distinction between the cases of a member getting himself educated out of the joint family funds and employing himself somewhere earning and acquiring properties and a member getting a cash contribution from the family and starting a trade on his own account. Unless it is shown that the joint family did not stop with the contribution but continued to take interest and the business was subsequently carried on with the assistance of the joint family it should not be held that the business is a family business.

P. Somasundaram for Appellant.

T. S. Narasinga Rao and *M. Balachandrudu* for Respondents.

R.M. *Appeal allowed.*

Rajamannar, C.J. and Suryaprakasa Rao *v.* Venkataraju.
Venkatarama Ayyar, J. Appeal No. 607 of 1949.
18*th December*, 1952.

Transfer of Property Act (*IV of* 1882), *section* 58 (*c*) *Proviso—Applicability—Sale with an agreement to reconvey—Agreement not embodied in the document of sale—Sale or mortgage by conditional sale—Construction.*

If a Court comes to the conclusion that an ostensible sale taken along with an agreement is not in reality a sale but only a mortgage then it follows that the mortgage is a mortgage by conditional sale. It could not be any other kind of mortgage or even an anomalous mortgage. (1946) 1 M.L.J. 342, followed. A.I.R. 1934 Nag. 18, dissented from. A.I.R. 1931 Bom. 371, considered.

The word ' deemed ' in the proviso has evidently been used because ostensibly the transaction is only a sale. When the condition of reconveyance is embodied in the same document it is open to the Court to hold that what purports to be a sale is really a mortgage. Then it can be said that the sale is ' deemed ' to be a mortgage.

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What the proviso says is that when the condition is not embodied in the same document in no case shall a sale be deemed to be a mortgage.

P. M. Srinivasa Aiyangar for Appellants.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Respondents.

R.M. ——— *Appeal dismissed.*

Subba Rao, J. Lakshmi Ammal *v.* Thangavel Asari.
5th January, 1953. S.A. No. 531 of 1949.

Hindu Widows' Re-marriage Act (XV of 1856), *sections* 2 *and* 5—*Hindu widow—Re-marriage—Forfeiture of husband's property—Scope of.*

A combined reading of sections 2 and 5 of the Act indicates that the forfeiture of the property by a widow on re-marriage is only confined to the category of cases detailed in section 2. Under section 2 she forfeits her rights only in her husband's property which she is entitled to by way of maintenance or by inheritance or by virtue of any will. The interest contemplated by the section is confined or limited to her lifetime. The section will not apply to the absolute interest legally acquired by the widow. (1946) 2 M.L.J. 377, relied on.

K. S. Sankara Ayyar and *V. Sundaresan* for Appellants.

R. Ramamurthi Ayyar for Respondent.

R.M. ——— *Appeal allowed.*

Govinda Menon and Basheer Ahmed Sayeed, JJ. Annaswami Mudaliar *v.*
23rd January, 1953. Ekambari Ammal.
A.A.O. No. 29 of 1952.

Civil Procedure Code (V of 1908), *sections* 151 *and* 153—*Court acting under inherent powers—Orders not appealable—Different provision of law also mentioned in the petition additionally—If would make the order appealable—Practice and procedure.*

When a provision of law cannot have any kind of application to a particular proceeding by the mere fact that it is stated in the petition it cannot be said that such a provision will be applicable.

Where the lower Court has invoked the inherent powers vested in it and sets aside an order it is an order passed under section 151, Civil Procedure Code and no appeal lies from such an order to the High Court. The mere fact that in the petition before the lower Court the petitioner has also mentioned Order 23, R. 3, Civil Procedure Code, as applicable to the case, which provision is clearly inapplicable to that case, the order does not become appealable.

A. Sundaram Ayyar for Appellant.

S. Muthiah Mudaliar and *Chockalingam* for Respondent.

R.M. ——— *Appeal dismissed.*

Subba Rao and Panchapakesa Ayyar, JJ. State of Madras *v.* Srinivasa Ayyangar.
28th January, 1953. S.C. C.M.P. No. 10596 of 1952.

Constitution of India, (1950), *Article* 133—*Leave to appeal to Supreme Court—Subject-matter of small value—Question of law of sufficient and general importance—Practice.*

In cases where the Court thinks that a case is a fit one for consideration by the Supreme Court, but that it would not be right to call upon the respondent whose financial interest in the matter is small to incur the risk of the costs of the appeal, the only course open is to refuse leave and leave the appellant, if so advised, to apply to the Supreme Court. In such cases it is safe to refuse leave, stating that the point in issue appears to be one of general importance but not of sufficient importance to the proposed respondent to warrant the Court in putting him to the expense of an appeal to the highest tribunal. But where the applicant is prepared to be liable for the costs of the respondent in any event, leave may be granted.

The Government Pleader (*P. Satyanarayana Raju*) for Petitioner.

R. Kesava Ayyangar and *K. Parasaran* for Respondent.

R.M. ——— *Leave granted.*

Chief Justice and Venkatarama Ayyar, J.
2nd January, 1953.

Abdul Aziz and Sons *v.* Subramanyam.
Ref. Cases Nos. 33, 39 and 40 of 1951.

Vegetable Oils and Oil-cakes (Forward Contracts Prohibition) Order (1944)—*Clause 4—If void—Defence of India Rules—Rule* 81 (2)—*Powers under—If exceeded.*

None of the provisions of the Vegetable Oils and Oil-cakes (Forward Contracts Prohibition) Order, 1944, is void or *ultra vires.* Clause 4 of the Order does not go beyond the power conferred by clauses (*a*), (*b*) and (*f*) of sub-rule 2 of Rule 81 of the Defence of India Rules. The regulation or prohibition is only in respect of distribution and disposal of articles or things. The provision for payment of difference on the basis of the rates fixed by the Government may be viewed as incidental or supplementary to the total prohibition under Rule 81 (2) (*f*) of the Defence of India Rules.

A.I.R 1951 Nag. 320 dissented from.

The Government Pleader (*P. Satyanarayana Raju*) for the State.

M. S. Ramachandra Rao and *M. Krishna Rao* for Applicants.

D. Narasa Raju, K. B. Krishnamurthi and *T. R. Srinivasan* for Respondents.

R.M. *Reference answered.*

Krishnaswami Nayudu, J.
8th January, 1953.

Sidda Setty *v.* Muniamma.
A.A.O. No. 405 of 1950.

Hindu Married Women's Right to Separate Residence and Maintenance Act (*XIX of* 1946)—*Section* 2 (4) *and* (7)—'*Marries again*'—'*Justifiable cause*'—*Meaning of.*

On a proper construction of the language in clause (4) of section 2 of Act XIX of 1946, the words 'marries again' could only refer to a future marriage, that is, marriage after the Act. This will be a reasonable and natural construction to be put upon the words without doing violence to the language or even to the spirit of the Statute and the language does not admit of any ambiguity and is plain. To do otherwise would be to lead to inconvenient and unjust results which should always be avoided in judicial interpretation of the words of a Statute. (1950) 1 M.L.J. 63, dissented from.

The use of the general words 'justifiable cause' in section 2 (7) following specific cases in clauses (1) to (6) though need not be confined to matters which arise from the cases mentioned in the other clauses, could not, however, be extended so as to bring within it any and every cause however trivial and inconsequential. The words 'justifiable cause' may receive the plain and ordinary meaning and no limitation may be imposed upon them. The contingency of the incompatibility of two wives living together is already provided for under the Act and a further extension of the principle covered under clause (1) could not be sought for under the general words 'justifiable cause'.

'Justifiable cause' must be some cause which should be considered to be real and serious by reason of which the position of the married woman becomes miserable and cannot be invoked for temporary bickerings that are of a fleeting nature. Sentimental incompatibility of a woman with the husband cannot be treated as 'justifiable cause'.

K. K. Gangadhara Ayyar for Appellant.

S. Sankara Ayyar for Respondent.

R.M. *Appeal allowed.*

Satyanarayana Rao and Balakrishna Ayyar, JJ.
12th January, 1953.

Srinivasan *v.* Rangachari.
Appeal No. 599 of 1949.

Hindu Law—Debts—Pious obligation—Suit by an endorsee of a promissory note against the father—Sons could not be impleaded—Execution of decree—Whether son's share could be seized.

It is no doubt true that in a suit by an endorsee of a promissory note against the maker of the promissory note, the father of a Hindu joint family, no decree could be made against the son as the plaintiff, who is only an endorsee of the promissory note, is not an assignee of the debt in respect of which the pious obligation of the sons would attach; but the decree against the father, the maker, itself constitutes a debt which could be enforced in execution against the shares of the sons as well

by reason of the pious obligation of the sons to discharge the antecedent debts of the father not tainted with illegality or immorality.

N. R. Raghavachari for Appellants.

S. V. Rama Ayyangar, P. S. Srinivasa Desikan, D. Ramaswami Ayyangar, P. R. Varadarajan, K. Kalyanasundaram, T. K. Sundarachari and *K. Satyanarayana* for Respondents.

R.M.

Ramaswami, J. Panchayat Board, Gundugolanu *v.* Nagamma.
12th January, 1953. S.A. No. 972 of 1949.

Madras Local Boards Act, (*XIV of* 1920)—*Section* 225—*Scope—Levy of tax by local authority—When can be challenged in Civil Court.*

Section 225 of the Madras Local Boards Act should be limited to suits for compensation or damages. A suit for refund of tax paid under protest is not governed by section 225.

If the objection to the imposition of a tax by a local authority goes to the root and the imposition itself is beyond the powers of the local authority, a party may come to the civil court and challenge the validity of the imposition. The courts can interfere in all cases where the provisions of the Act, under which the statutory body is created, are not complied with in substance and effect.

Case-law reviewed.

T. G. Krishnamurthi for Appellants.

N. C. V. Ramanujachari for Respondent.

R.M. *Appeal allowed. No leave.*

Raghava Rao, J. Madhavi Amma *v.* Nallammal.
16th January, 1953. C.R.P. No. 1807 of 1952.

Madras Buildings (*Lease and Rent Control*) *Act*, 1949—(*Amended by Act VIII of* 1951)—*Sections* 9 *and* 12-*B*—' *As if it were a decree* '—*Meaning of—Power of revision under—Existence of a remedy by a separate suit—If a bar.*

Merely because the order for eviction by a Rent Controller is to be executed as if it were a decree by the Civil Court, it does not follow that the proceedings which have given rise to the order for eviction can be regarded as a regular suit to which the ordinary procedure of trial of suits under the Civil Procedure Code becomes applicable. The order of eviction may well be executable as if it were a decree but the supposition is that it is not a decree excepting so far as the executability is concerned.

As section 12-B of the Madras Act XXV of 1949 provides for the revision of an order under section 9, the High Court cannot refuse to consider on the merits a revision on the ground that a remedy by way of separate suit exists under Order 21, rule 103, of the Code of Civil Procedure.

M. S. Venkatarama Ayyar and *S. Viswanathan* for Petitioner.

K. Vaitheeswaran for Respondent.

R.M.

Ramaswami, J. *In re* : Venkataswami Ayya.
19th January, 1953. Crl. R. C. No. 614 of 1952.
Crl. Rev. Pet. No. 510 of 1952.

Stamp Act (*II of* 1899), *Sections* 27 *and* 64—*Offences under—What amounts to—Onus of proof—Persons liable under.*

As the law stands *two courses* are open, when a document is sought to be registered on an under-valuation. *First* of all, if the Registrar either from his own information or otherwise suspects that the valuation given is an under-valuation with intent to cheat the Government of the legitimate duty, he can ask for particulars from the party and if satisfied with its under-valuation, can refuse to register the document unless proper duty was paid. *Secondly,* in case where the document gets registered and the information is subsequently received that the valuation shown is an under-valuation and that the legitimate stamp duty has been intentionally evaded to defraud the State, it will be open to the Registrar to initiate a prosecution under section 27 read with section 64 of the Indian Stamp Act.

The burden of proof is upon the prosecution to show affirmatively and satisfactorily that the terms of section 27 have not been complied with. Mere non-payment of a proper stamp duty does not make a person liable for prosecution under section 64 of the Act unless it is proved that he had an intention of defrauding the Government of its stamp revenue. Section 64 (*b*) is not restricted to the scribe of the instrument but is wide enough to reach and punish the person who is in truth the author of the deed and is responsible for it though he writes the deed through the hand of another. It is not correct to say that a vendee of a sale-deed will never be liable under section 64 (*a*) or (*b*) and that the executant of the document alone will be liable.

Case-law discussed.

K. V. Ramaseshan for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

R.M. ——— *Revision allowed.*

Ramaswami, J. Dowlatu *v.* Deputy District Transport Officer.
19th January, 1953. Crl. Rev. C. No. 673 of 1952.

Criminal Procedure Code (*V of* 1898)—*Section* 197—*Prosecution under—Nature of.*

Where a public servant, purporting to discharge his official duties does an unlawful act for which he is prosecuted, the question of sanction would arise only if it is found that the acts committed by him were in discharge of his official duties. It is not a pure question of law but a mixed question of law and fact and has to be decided after investigation and cannot be short-circuited by summarily throwing out the complaint. According to the plain words of section 197, Criminal Procedure Code, it deals with cases where a public servant acts or purports to act in the discharge of his official duty and the section will afford no protection where the acts complained of plainly fall outside of duty or purported duty of a public servant. In such cases no sanction is required for prosecution.

V. V. Raghavan and *D. L. N. Raju* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

R.M. ——— *Case remanded.*

Ramaswami, J. Natesa Udayar *v.* Kanakasabai Udayar.
21st January, 1953. Crl. Rev. Case No. 715 of 1952.

Criminal Procedure Code (*V of* 1898)—*Section* 250—*Scope of—Compensation—When allowed.*

It is no doubt a very salutary provision of law that is embodied in section 250, Criminal Procedure Code. It is meant to serve as a check on propensities to rush to court recklessly or to level accusations against innocent people knowing or having reason to believe they are innocent. It is not, however, to be used indiscriminately as to be a check on legitimate complaints which may be difficult of proof owing to some reason for which the complainant may not be responsible.

A Magistrate has jurisdiction to hold, after full enquiry, even after framing charge against an accused, that the charge is frivolous and vexatious. But where a Magistrate considers the evidence sufficient to justify the framing of a charge and subsequently changes his opinion he must give reasons for so changing.

Padmini Raghavan for the Petitioner.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

R.M. ——— *Revision allowed.*

Mack, J. Ramayya *v.* Venkatachallamma.
22nd January, 1953. A.A.O. No. 15 of 1950.

Arbitration Act (*X of* 1940)—*Section* 47—*Proviso—Scope.*

Prima facie section 47 of the Arbitration Act governs references to arbitration by parties in a pending suit without reference to or knowledge of the Court. The Act does not provide for arbitration in pending suits except through Court. Accord-

ing to the Proviso to section 47, an award on the footing of an arbitration in a pending suit may only form the basis of a decree by consent.

Where in a private arbitration in a pending suit without the knowledge of the Court, arbitrators begin to differ from each other, give each other the lie, if not begin to quarrel with each other, another dispute is in consequence created and the only course is for a Court to ignore the arbitration and decide the suit on its merits.

B. V. Ramanarasu for Appellant.

M. S. Ramachandra Rao and *M. Krishna Rao* for Respondents.

R.M.

Subba Rao, J.
23rd January, 1953.

Meenakshi Ammal *v.* S. R. M. Manickam Chettiar.
Appeal No. 32 of 1948.

Transfer of Property Act (IV of 1882)—*Section* 63-A—*Mortgagee—Right to improvements or costs—'Maramat'—If includes reclamation operations.*

If there is no contract to the contrary within the meaning of section 63-A (1) of the Transfer of Property Act the mortgagee in possession will be entitled either to the improvement, effected by him or in case the improvement is not severable from the land, to its cost.

I.L.R. (1947) Mad. 411 : (1946) 2 M.L.J. 322, followed.

The word 'maramat' is comprehensive as to take in reclamation operations also.

M. S. Venkatarama Ayyar for Appellant.

R. Sundaralingam for Respondents.

R.M. *Appeal dismissed.*

Raghava Rao, J.
30th January, 1953.

Koyan *v.* Rajammal.
C.R.P. No. 1054 of 1952.

Court-fees Act (VII of 1870)—*Schedule I, Article I—Scope of—When applies.*

A written statement pleading a set-off, whether legal or equitable, must bear court-fee whether the set-off is tantamount to an extinguishment of the plaint claim or to a partial reduction of the plaint claim. Where the written statement on its allegations refers to the payments which will have the effect of either extinguishing or reducing the suit claim as payments which in law must be held to be in the nature of *payments to the plaintiff himself*, the defendant is not under an obligation to pay any court-fee on that amount although when he fails to prove the legal effect of the payments in question to be that of payments to the plaintiff himself, the plea of the credit claimed by the defendant on the foot of payments may have to fail.

C. K. Viswanatha Ayyar for Petitioners.

C. S. Swaminathan for Respondents.

R.M.

Raghava Rao, J.
3rd February, 1953.

Chockalingam Chettiar *v.* Alagammai Achi.
C.R.P. No. 1279 of 1952.

Civil Procedure Code (V of 1908)—*Order* 8-*A, rule* 8—*Applicability—Directions of Court—Scope of.*

While where a person against whom a Third-party procedure is sought to be availed of is not already a party to the record he has to be impleaded on an application to be made for that purpose, it does not follow that the Third-party procedure cannot be availed of as against a person already on record.

The considerations governing the application of the Third-party procedure to any particular case are substantially similar to those considerations which influence the discretion of the court in impleading parties under Order 1, rule 10, Civil Procedure Code.

P. S. Chandrasekara Ayyar and *P. S. Ramachandran* for Petitioners.

T. R. Srinivasan and *T. Ramalingam* for Respondent.

R.M.

Satyanarayana Rao, J. Pottiveera Raju *v.* Ambatti Abbayi.
10th December, 1952. S.A. No. 532 of 1949.

Madras Local Boards Act (*XIV of* 1920)—*Section* 160 (3) *and section* 3 (18)—'*Road-side*' *and* '*Public Road*'—*Limits of.*

The expression 'Road-side' used in section 160, sub-section (3) of the Madras Local Boards Act, 1920, must be understood in the light of the definition of 'Public Road' in section 3, sub-section (18) of the Act, as meaning the land which is on either side of the road-way up to the boundaries of the adjacent property.

C. Rama Rao for Appellant.

K. Bhimasankaram for Respondent.

R.M. ——— *Appeal allowed. No leave.*

Venkatarama Iyer, J. Balakrishnan *v.* Balasundara Gramani.
28th January, 1953. S.A. No. 1158 of 1949.

Hindu Law—Alienee of Hindu joint family property—Right of partition—Allotment of the alienated property to the share of the alienor—Equities—When invoked.

An alienee of property of a Hindu joint family should normally be relegated to filing his own suit for partition and therein ask that in equity the alienated property might be allotted to his alienor's share. But in a suit filed by the coparceners for setting aside the alienation, they should be granted possession of the properties subject to these equities in favour of the alienee being worked out in an independent action.

M. S. Venkatarama Aiyar for Appellant.

Respondent not represented.

R.M. ——— *Appeal allowed. No leave.*

Venkatarama Ayyar, J. Seshi Reddi *v.* Venkatasubbayya.
29th January, 1953. S.A. No. 1159 of 1949.

Negotiable Instruments Act (*XXVI of* 1881)—*Section* 51—*Negotiation by several payees at intervals—Validity.*

Section 51 of the Negotiable Instruments Act requires that where there are several payees of a negotiable instrument all of them should endorse the instrument in order to negotiate the same. The section, however, does not require that all of them should endorse at the same time.

I.L.R. 24 Mad. 654 and 1922 M.W.N. 263, followed.

P. Babulu Reddy for Appellant.

K. Kotayya for Respondent.

R.M. ——— *Appeal dismissed. No leave.*

Satyanarayana Rao, J. Kothari & Sons *v.* Krishna Rao.
3rd February, 1953. S.A. No. 784 of 1949.

Limitation Act (*IX of* 1908), *section* 24 *and article* 90—*Period of limitation—Computation—How made.*

The third column in article 90 of the Limitation Act must be read with the modification contained in section 24 of the Act. Under that section the period of limitation should be computed from the date when the injury resulted. The time from which period begins to run under the third column of article 90 of the Limitation Act can be extended by invoking the provisions of section 24 of the Limitation Act.

I.L.R. 54 Bom. 226, 24 A.L.J. 550 and I.L.R. 8 Pat. 776, followed.

21 M.L.J. 453, dissented from.

R. Narasimhachariar for Appellant.

P. C. Parthasarathi Ayyangar for Respondent.

R.M. ———

N R C

Basheer Ahmed Sayeed, J. Thirukoilur Sri Viratteswarar Devasthanam *v.* Ramanathan Chettiar.
4th February, 1953. C.R.P. No. 627 of 1952.

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951)—Sections 57 and 93—Scope—Disputes under—Jurisdiction of Civil Court—If ousted—Whether operates retrospectively.

Neither section 57 nor section 93 of the Madras Hindu Religious and Charitable Endowments Act, 1951, would on a reasonable construction of the language employed therein, amount to an ouster of the jurisdiction of the Civil Court. Merely because a provision is made giving power to the Deputy Commissioner to enquire into disputes of the nature described in section 57 it is too much to say that the Civil Court has lost its jurisdiction to try suits in which such disputes arise.

Section 93 does not appear to have any retrospective effect and refers only to suits to be filed after the new Act came into force and probably such suits cannot be filed under this Act without exhausting the remedies provided in the special Act.

T. V. Balakrishnan for Petitioner.

K. Parasurama Aiyar for Respondent.

R.M. ——— *Revision dismissed.*

Krishnaswamy Nayudu, J. Raghavendra Rao *v.* Venkammal.
6th February, 1953. A.A.O. No. 68 of 1947.

Code of Civil Procedure (V of 1908)—Order XXI, rules 11 to 14 and 16.

Once it is shown that an execution petition by a transferee decree-holder complied with the requirements of Order XXI, rules 11 to 14 and 16 of Civil Procedure Code, the effect or otherwise of a succession certificate not having been produced along with the execution, would not be of consequence, since it is nowhere said in the rules referred to, that a transferee decree-holder's application should also be accompanied by the succession certificate when the transfer is by persons who have become entitled to the decree by operation of law. The want of a succession certificate may deprive the assignee decree-holder of the remedy of the relief which he seeks in the execution petition. But it certainly cannot vitiate the petition itself as there is nothing which says that a succession certificate should be filed along with such an application.

C. A. Vaidyalingam for Appellant.

K. S. Desikan for Respondent.

R.M. ——— *Appeal dismissed. No leave.*

Rajamannar, C.J. and Venkatarama Ayyar, J. Meera Sahib *v.* Tharaganar & Bros.
6th February, 1953. Writ Appeals Nos. 8 to 15 of 1953.

Income-tax Act (XI of 1922), section 5 (8)—Validity—Constitution of India—Article 14.

There is nothing in section 5 (8) of the Income-tax Act which is inconsistent with the right guaranteed under article 14 of the Constitution.

M. R. M. Abdul Karim for Appellant.

R.M. ——— *Appeal dismissed.*

Satyanarayana Rao, J. Tikaram Prasad *v.* Manikyala Rao.
6th February, 1953. S.A. No. 1286 of 1949.

Hindu Law—Alienation of joint family property—Proof of discharge of antecedent debt—Recital in the document different—If vitiates the binding character of the alienation.

Where an alienation of property of a Hindu joint family is made and it is proved that an antecedent debt of the father was in fact discharged out of the sale price the alienation will be binding, as valid on the members of the family. Simply because in the agreement of sale a different purpose for the sale was intended or stated and was not actually carried out it would not make any difference.

A.I.R. 1928 Mad. 450, distinguished.

K. Krishnamurthi for Appellant.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Respondent.

R.M. ——— *Decree modified.*

Govinda Menon and Basheer Ahmed Sayeed, JJ.
5th November, 1952.

District Collector of Krishna *v.*
Pulavarthi Visvanadhan and others.
A.A.O. No. 102 of 1948.

Defence of India Act (*XXXV of* 1939), *section* 19—*Principles of fixing compensation—Interest on compensation when allowed.*

Because section 19 (*e*) (i) of the Defence of India Act lays down specifically that in making an award the arbitrator shall have regard to the provision of sub-section (1) of section 23 of the Land Acquisition Act 1894 it is impossible to contend that the provisions of sub-section (2) of section 23 have also been attracted. The specific mention of sub-section (1) excludes the application of sub-section (2). A.I.R. 1951 Bom. 72 at page 79 followed.

In cases of requisition of property where the compensation paid is only in the nature of damages for temporary requisition no interest on such amount could be awarded. But where the requisitioning is one of permanent acquisition and amounts to conversion of the land into money the party from whom the property is taken away is entitled to interest on the value of the property not paid to him.

A.I.R. 1950 Cal. 498 approved; (1947) 2 M.L.J. 429 : I.L.R. 1948 Mad. 567 considered and doubted.

The Government Pleader (*P. Satyanarayana Raju*) for Appellant.

V. V. Sastri, P. Somasundaram and *P. Suryanarayana* for Respondents.

R.M. ——— *Decree modified.*

Raghava Rao, J.
28th January, 1953.

Shacomraj Poonamchand *v.*
Ponmuru Venkataratnam Chetti.
C.R.Ps. Nos. 1678 and 1789 of 1952.

Madras Buildings (*Lease and Rent Control*) *Act* (*XXV of* 1949), *section* 7 (2), *Proviso and section* 9—*Amendment—Scope—City Civil Court acting as court of execution—If can go into the question of the wilfulness or otherwise of the default.*

An execution proceeding under section 9 of the Madras Act XXV of 1949 will be governed by the Amending Act VIII of 1951 if it had come into force by then. An objection to the executability of an order of the Rent Controller (ordering eviction of tenant on the ground of default in payment of the rent under the original Act) on the footing that the default is not wilful as per the amended provisions of the Act can be entertained by the executing court.

(1952) 1 M.L.J. 628 followed.

P. S. Kodandapani for Petitioner.

C. A. Vaidyalingam, T. Venkatadri, K. Ramachandra Rao and *P. Venkataswami* for Respondents.

R.M. ——— *Case remanded.*

Satyanarayana Rao, J.
29th January, 1953.

Venkataramanacharya *v.* Lakshmi Devi.
S.A. No. 947 of 1949.

Transfer of Property Act (*IV of* 1882), *sections* 59 *and* 100—*Charge on immoveable property if amounts to an interest in immoveable property.*

A charge created on certain immoveable properties for a specific amount does not create any interest in the immoveable property unlike a mortgage and any assignment of the rights to recover an amount with a charge on the properties does not amount to a transfer of an interest in the immoveable property. It is no doubt true that a charge could be created in writing by a registered document. That is because of the specific language of section 100 of the Transfer of Property Act which attracts the provisions contained in section 59 of the Transfer of Property Act and not for the reason that a charge creates any interest in the immoveable property.

T. Krishna Rao for Appellant.

K. Srinivasa Rao for Respondent.

R.M. ——— *Appeal allowed. No leave.*

NRC

Satyanarayana Rao, J. Masulipatnam Municipal Council *v.* The Brindavan Talkies.
4th February, 1953. S.A. No. 993 of 1949.

Madras District Municipalities Act (*V of* 1920), *sections* 129 *and* 131—*Explanation—Supply of water for domestic consumption—Domestic consumption and use—What amounts to—Tests.*

The language of section 131 of the District Municipalities Act indicates that the essential test is the user and the nature of consumption of the water to determine whether or not it is a domestic consumption and use. The nature of the user and consumption is the deciding factor. In order to make the user a non-domestic use for purposes of trade or business the water must be used as a raw material for the purpose of the trade or business as in the case of persons carrying on dyeing business or running a laundry and so on.

The mere fact that for purposes of trade or business people go to a particular premises or reside there and utilise the water would not make the user a user for trade or business. The test is to see whether the user is a domestic user or not without reference to the premises to which the water is supplied and without reference to the persons who use it.

Case-law discussed.

K. Kuttikrishna Menon for Appellant.

D. Narasaraju and *K. B. Krishnamurthi* for Respondent.

R.M. ——— *Appeal dismissed. No leave.*

Satyanarayana Rao, J. Ulamussan Haji *v.* Subrama Iyer.
4th February, 1953. S.A. No. 925 of 1949.

Evidence Act (*I of* 1872), *section* 116—*Estoppel—Landlord and tenant—Tenant when can set up title against the landlord—Payment of rent to the person whose title has ceased—Effect.*

The estoppel as contained in section 116 of the Evidence Act between a landlord and tenant is during the continuance of the tenancy and the prohibition is against the tenant from denying the title of the landlord as it stood at the beginning of the tenancy. If, however, the title of the landlord had determined during the tenancy or if there was an eviction by title paramount or even if there was no actual eviction by paramount title, there was threat of such eviction coupled with attornment to the paramount title-holder by the tenant, it is open to the tenant to show that the landlord has no title at a point of time subsequent to the inception of the tenancy. If the tenant continued to pay rent after the cessor of the title of the lessor, such a payment is of no legal effect and is ineffective to revive the old tenancy or create a new tenancy.

M. K. Nambiyar and *V. P. Gopalan Nambiyar* for Appellant.

B. Pocker and *V. Balakrishna Erady* for Respondents.

R.M. ——— *Appeal dismissed.*

Mack, J. Rangaswami Naicker *v.* Janaki Ammal.
5th February, 1953. A.A.O. No. 275 of 1950.

Hindu Law—Widow's right of maintenance—If restricted to properties charged under a decree—When can Court refuse to execute against other properties of the joint family—Practice—Stay order by High Court vacated—Lower Court should proceed with the case.

It is settled law that the right of a Hindu widow for her maintenance cannot be confined to property charged with her maintenance and that she need not exhaust it all before she can proceed against other properties belonging to her husband's joint family.

1932 M.W.N. 1200 followed.

If a judgment-debtor can satisfy the executing court that the decree-holder is acting in *mala fide* collusion with one of the other judgment-debtors in execution against him only the executing court would be perfectly entitled to refuse execution in a case such as this until the charged property has been exhausted.

As a general practice, when a stay petition arising out of a C.M.A. or C.R.P. is dismissed there should be no need what-so-ever for a stay in fact to operate during the pendency of the main matter. The lower Court should retain sufficient papers in their possession to proceed further with the execution or any other matter, stay as regards which has been dismissed by the High Court, pending the disposal of the main appeal or petition.

M. Krishna Bharathi for Appellant.

S. T. Srinivasagopalachari and *S. V. Venkatasubramanian* for Respondent.

R.M. ——— *Case remanded.*

Balakrishna Ayyar, J. Gopalan *v.* Kanaran.
5th February, 1953. S.A. No. 1029 of 1949.

Transfer of Property Act (*IV of* 1882), *section* 53-A, *Proviso—Scope of protection afforded under—Notice—What amounts to—Manner of getting notice—If material—Payment of money—When sufficient to constitute part performance.*

The Proviso to section 53-A of the Transfer of Property Act is intended to protect persons who in actual truth and in fact have no notice of the interests of a contracting party. But when actually as a matter of fact they have such notice, the informality of the manner in which they acquired that notice or information does not appear to be material. The main thing is that the transferee should know. It does not matter how he knows it. So long as it is credible information, which a person of ordinary prudence will take notice of, he will be bound by it. Payment of money may also be sufficient to constitute part performance and will be sufficient compliance with the requirements of section 53-A of the Transfer of Property Act and such payment can be treated as an act in furtherance of the contract.

M. K. Nambiyar for Appellant.

D. A. Krishna Variar and *M. Sekhara Menon* for Respondents.

R.M. ——— *Appeal dismissed.*

Raghava Rao, J. Chellammal *v.* K. T. A. Abdul Rahman Rowther.
5th February, 1953. C.R.P. No. 229 of 1951.

Court-fees Act—Suit for partition of lands, in Dharmasanam village and for declaration of joint right in certain impartible items—Mode of valuation—Jurisdiction.

In a suit for partition of the plaintiff's share in a Dharmasanam village, the value for purpose of court-fee and jurisdiction must be ascertained with reference to the plaintiff's share of the items. This is on the analogy of partition suits in which the share of the plaintiff is held to matter. Where the plaintiff has also prayed for declaration of his joint right in certain porambokes incapable of partition, his relief is not capable of valuation as in the case of temple or such other trust properties. Where the land itself being impartible and communal property not capable of valuation the existence of trees on the land and which has a particular money value, cannot affect the question of valuation of the suit.

(1947) 1 M.L.J. 112; 45 M.L.J. 274 : I.L.R. 46 Mad. 782 (F.B.) and 67 M.L.J. 688 referred.

R. Kesava Ayyangar and *K. Parasaran* for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) and *U. Somasundaram* for Respondents.

R.M. ——— *Revision allowed.*

Mack, J. Ponnuswami Gounder *v.* Rangaswami.
6th February, 1953. A.A.O. No. 21 of 1950.

Workmen's Compensation Act (*VIII of* 1923), *section* 2 (1) (*d*)—"*Dependant wholly or in part*"*—What constitutes.*

Whether a person is partially dependent on the earnings of a deceased workman is a matter essentially of fact to be decided in the circumstances of each case.

No general principle of law could be laid down to cover cases, even of a similar nature.

(1952) 2 M.L.J. 436 dissented from.

T. S. Krishnamurthy Ayyar for Appellant.

R. Krishnaswami Ayyar for Respondents.

R.M. *Appeal dismissed.*

Rajamannar, C.J. and Venkatarama Ayyar, J. Sabulal Saheb *v.*
9th February, 1953. State of Madras.
Writ Petition No. 595 of 1952.

Motor Vehicles Act (IV of 1939), *section* 60 (1) (*a*) *and Rule* 160-*C—Scope—Amendment—Effect.*

According to the earlier rule 160-C of the Motor Vehicles Rules, there can be no breach of condition of a licence, when on the date of an order passed under section 60 of the Act the tax had been paid (*vide* new rule).

T. Chengalvarayan for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) and the Government Pleader (*P. Satyanarayana Raju*) for Respondent.

R.M. *Order quashed.*

Rajamannar, C.J. and Venkatarama Ayyar, J. Royal Calcutta Turf Club *v.*
13th February, 1953. V. K. T. Raman Menon.
O.S.A. No. 10 of 1952.

Letters Patent (Madras)—Clause 15*—Judgment—Order refusing or allowing inspection of documents under the Original Side Rules, Madras High Court—If a judgment—Whether an appeal lies.*

An order refusing to allow inspection of certain accounts which were disclosed in the affidavit of documents of a party to a suit on the Original Side of the High Court is not a judgment within the meaning of Clause 15 of the Letters Patent and therefore no appeal lies from it. On principle there is no difference even if the order allows inspection.

52 M.L.J. 152 and I.L.R. 35 Mad. 1 followed.

Messrs. King and Partridge, K. Veeraswami, G. John Arthur and *C. K. Vedachalam* for Appellant.

S. Gopalaratnam for Respondents.

R.M. *Appeal dismissed.*

Govinda Menon, J. Subbu Lakshmi Ammal *v.*
13th February, 1953. Venkateswara Ayyar.
C.R.P. No. 619 of 1952.

Stamp Act (II of 1899), *section* 33 *and Schedule I-A—Agreement to pay maintenance under Hindu Law—If secures an annuity—Impounding—Necessity.*

In a document, which is only an agreement recognising the pre-existing right under the Hindu Law of a wife to be maintained by the husband and which fixes the amount of maintenance payable to the wife, no question of any annuity arises and there is no necessity to impound the same.

T. R. Ramachandran and *R. Sitharaman* for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) for Respondent.

R.M. *Revision allowed.*

Rajagopalan and Chandra Reddi, JJ. Ethirajan *v.* Commissioner of Police.
13th February, 1953. Crl. Mis. Pet. Nos. 90 and 91 of 1953.

Preventive Detention Act (IV of 1950), *section* 7 *and Constitution of India, Article* 22 (5)*—Grounds of detention sent in a language which detenu could not understand—Sufficiency—Subsequent translation—If could cure the defect if any—Insubordination in police force—If constitutes a threat to public peace under the Act.*

Quaere.—Whether the drafting of the grounds of detention in English which language a detenu does not understand, amount to a denial of the "*earliest opportunity*

of making a representation against the order of detention " within the meaning of Article 22 (5) of the Constitution of India ?

If it is necessary to furnish the detenu with the grounds for the order of detention in a language which he knew, it is not necessary that it should be simultaneous with the service of the grounds of detention itself. (1951) S.C.R. 167, followed.

Quaere.—Whether the grounds of detention could take into account events that happened subsequently to that detention ?

The safety of the State and certainly the interest of law and order depend on keeping the discipline of the police force in tact. Anything to undermine that discipline, even if it originated with an individual case of insubordination, was certainly a ground which the Government can take into account in holding that it imperilled public safety.

Messrs. Rao and Reddy and *S. Mohan Kumaramangalam* for Petitioner.

The State Prosecutor (*S. Govind Swaminathan*) for the State.

R.M. *Petitions dismissed.*

Rajagopalan and Chandra Reddy, JJ. *In re* C. G. Menon.
20th February, 1953. Crl. Rev. Case No. 1034 of 1952.
(Case Referred No. 51 of 1952.)

Fugitive Offenders Act (1881), *section* 14—*Validity—Constitution of India, Articles* 13 *and* 14—*If offended.*

By reason of Article 13 (1) of the Constitution of India a section offending the said article is not struck out from the Statute book but no effect will be given to any of its provisions in regard to a person claiming that his fundamental rights are affected thereby. (1951) S.C.R. 228 and observations of Subba Rao, J., in W.P. No. 568 of 1952 (unreported), followed.

Section 14 of the Fugitive Offenders Act offends Article 14 of the Constitution of India in that it denies " the equal protection of the laws within the territory of India ", that is, the laws relating to extradition and surrender of fugitive offenders and that, to that extent, section 14 is void under Article 13 (1) of the Constitution.

Section 14 of the Act is severable from the rest of Part II of the Act.

Section 14 of the Fugitive Offenders Act is inconsistent with the fundamental right of equal protection of the laws guaranteed by Article 14 of the Constitution and is to that extent void and unenforceable.

Quaere.—Whether the Fugitive Offenders Act, 1881, applies to India after 26th January, 1950, when India became a Sovereign Democratic Republic ?

Per Chandra Reddi, J.—The necessity for a speedy trial cannot furnish a basis for valid and reasonable classification under Article 14 of the Constitution. Speedy trial of offences may be the reason and motive for the legislation but it does not amount either to classification of offences or of cases.

In some cases classification based on geographical contiguity may be a sound one and may not be hit at by the doctrine of equal protection of laws. But under the Fugitive Offenders Act, Part II applies to the territory formerly known as British India (now Part A States) and the then Indian States (now Part B States) being governed by the procedure prescribed under Part I. If the extradition of a fugitive offender is sought from any part of a Part A State, what was designed comprehensively as British India prior to the establishment of India as a sovereign Republic, the procedure applicable is that prescribed in Part II of the Act, while if a demand for surrender of an offender is made to any Indian State, now included in the list of Part B States, a different procedure, namely, the requirements of a *prima facie* case has to be followed. This classification is discriminatory.

The Advocate-General (*V. K. Thiruvenkatachari*) and the State Prosecutor (*S. Govind Swaminathan*) for the State.

M. K. Nambiar, B. T. Sundararajan and *C. F. Louis* for the Accused.

R.M. *Reference answered accordingly.*

Subba Rao, J. Chandrabhogi *v.* Gudappa Bhandary.
24th February, 1953. S.R. Nos. 1257 and 3174 of 1953.

Court-Fees Act (VII of 1870), *Article* 17-*B and section* 7 *(iv) (f)—Scope of—Suit for partition and accounts—Valuation—How made.*

It is settled law that a relief for partition is not capable of valuation and therefore Article 17-B of Schedule II of the Court-Fees Act will apply. It is equally well established that a relief for accounting is governed by section 7 (iv) (*f*). It has also been held that in a suit for rendition of accounts, where the amount is ascertained and a decree granted for a specific amount, the defendant should pay *ad valorem* court-fee in an appeal against that decree. If a relief for partition and a relief for accounting are two distinct subject-matters they should be separately valued even though the reliefs are clubbed together in the same suit. But if the relief for accounting is implied in the relief for partition, it cannot be said that the former relief is in respect of a different subject-matter. In that case, though it is framed as a separate relief, in effect and substance it will be part of the same relief.

I.L.R. 43 Cal. 459, followed.

I.L.R. (1940) Mad. 259: (1940) 1 M.L.J. 32, relied on.

(1949) 2 M.L.J. 402, distinguished and doubted; (1938) 1 M.L.J. 628, explained; (1949) 2 M.L.J. 782; (1952) 2 M.L.J. (N.R.C.) 47, referred.

Case-law reviewed.

T. Krishna Rao, G. Kamath and *A. V. Narayana Pai* for Petitioner.

R.M. ——— *Appeal allowed.*

Rajamannar, C.J. and Venkatarama Ayyar, J. Chandanmull & Co.
25th February, 1953. *v.* Mohanlal Metha.
C.M.P. No. 10470 of 1952.

Constitution of India, Article 133, *sections* 109 *and* 110 *and Order* 45, *rules* 2 *and* 3, *Civil Procedure Code—Leave to appeal—Final judgment—What is.*

The language of section 109, clause (*a*), Civil Procedure Code, is absent in Article 133 (1) of the Constitution of India. It is only a final judgment that will fall within the category of judgment referred to in Article 133 (1) of the Constitution. An order like the one in question, *viz.*, an order refusing to excuse the delay in filing an application cannot be treated except as a procedural order. Though it may have far reaching consequences and adversely affect the rights of parties, by itself it cannot be held to have decided the rights of parties. If as a result of the dismissal of such an application a substantive application is dismissed, or otherwise put an end to, it may then be held that there has been a final adjudication of rights and therefore there has been a final order.

Case-law discussed and reviewed.

K. C. Doraiswamy for Petitioner.

A. N. Rangaswamy and *T. T. Srinivasan* for Respondents.

R.M. ——— *Petition dismissed.*

Somasundaram, J. Public Prosecutor *v.* Subramanyam.
27th February, 1953. Crl. Appeal No. 703 of 1951.

Prevention of Corruption Act (II of 1947, *as amended by Act XVI of* 1950), *section* 5 (3)—*If creates a specific offence—Presumption under.*

Section 5 (3) of the Prevention of Corruption Act, 1947, is only a rule of evidence and nothing more. It is somewhat similar to section 114, Illustration (*a*) of the Indian Evidence Act and does not create any specific offence and a separate charge need not be framed under it.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) in person.

G. Gopalaswamy for Accused.

R.M. ——— *Sentence modified.*

Krishnaswami Nayudu, J. Subba Rao *v.* Sathyanarayanamurthi.
9th January, 1953. A.A.O. No. 528 of 1949.

Civil Procedure Code (V of 1908), section 34 and Order 34, rule 11—Scope—Subsequent interest—If could be given as a rule of construction where the decree is silent—Amount due under a decree—If judgment-debtor is prohibited from disputing at a later stage.

The principle of constructive *res judicata* in execution proceedings would not be applicable to cases where the question of the amount for which execution is taken out is in dispute and it would be open to the judgment-debtor at any time in any execution proceedings to raise the objection that the amount for which execution is sought for is not the correct amount under the decree. The fact that an execution was ordered would not amount to an adjudication that the correct amount due under the decree was ascertained as the amount for which execution was ordered. It will be open always to the judgment-debtor at any stage in the execution proceedings, so long as the decree is not satisfied, to contest the correctness of the amount for which execution is sought for.

(1937) 1 M.L.J. 296, foll.

Order 34, rule 11, C.P.C., does not lay down that all mortgage-decrees shall provide for subsequent interest at a certain rate. Such interest would be payable under rule 11 of Order 34 only if the Court had awarded it by virtue of the power which it had at the time of the passing of the preliminary decree and making provision for subsequent interest.

In so far as this power is concerned, discretion is vested in courts to award interest and in what manner that discretion is to be exercised is no doubt provided under Order 34, rule 11, C.P.C. Section 34, C.P.C., is a general provision relating to interest and section 34 (2) does not confer on the Court any power to award interest but embodies a rule of construction that when a decree is silent as to interest, it must be deemed that the Court must have refused interest; and even apart from section 34 in the absence of any other provision in the decree to justify the Court coming to a conclusion that subsequent interest has been awarded, it must be held that the omission is due to the fact that the Court intended not to award such interest.

D. Narasaraju and *K. B. Krishnamurthi* for Appellant.

K. Bhimasankaram and *P. Sithikanta Sastri* for Respondent.

R. M. *Appeal allowed.*

Raghava Rao, J. Govindarajulu Chetti *v.* Balasundara Naicker.
20th January, 1953. C.R.P.No. 2262 of 1952.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 12-B—Revisional powers under—If limited as under section 115, C.P.C.—If wide as a right of appeal—Scope of interference by the High Court—Orders in execution under section 9 of the Act—Finding of fact—When High Court can interfere.

The substance or effect of any enactment cannot be understood except by a construction of it in accordance with its language, and with the difference in the language that undoubtedly exists between section 12-B of Madras Act XXV of 1949 as amended by Act VIII of 1951 and the language of section 115, C.P.C., it cannot be said that a revision petition under section 12-B of the Act is canvassable only within the strict limits of section 115, Civil Procedure Code. But it is equally clear that because section 12-B is wider than the language of section 115, Civil Procedure Code, it cannot be said that it is in effect and in substance a reproduction of the appeal provision which existed prior to the amendment from orders in execution under the Act.

The distinction between revisability and appealability is a thing well-defined in actual practice. The legislature did not intend to confer a right of appeal in the strict sense of that expression when it conferred a power of revision upon the High Court in the language that it employed in section 12-B of the Act.

If an order can be held to be improper on the evidence on record the High Court will be doing the right thing in setting aside the order of the Court below. If the improbabilities which induced the Court below to reject the positive evidence were to be eschewed or excluded from consideration and there is no further ground exigible from the expressed reasoning of the Court below or from the rest of the record to justify the order passed by it the High Court can interfere in revision.

R. Mathrubutham for Petitioner.

N. Nagaraja Rao for Respondent.

R.M. ——— *Revision allowed.*

Mack, J. Abdulla Kutty *v.* Janaki.
28th January, 1953. A.A.O. No. 313 of 1952.

Workmen's Compensation Act (VIII of 1923), *Schedule—Quantum of compensation—If reducible on the ground of contributory negligence—Minor injury proving fatal due to negligence of injured person.*

The Act does not make provision for the reduction of the scheduled compensation on the score of any contributory negligence on the part of a workman who dies in consequence of injuries he receives in the course of his employment, which ordinarily would not be fatal and which are simple. The analogy of criminal law of a conviction only for simple hurt though the simple hurt caused may prove fatal due to other circumstances is not applicable to compensation awardable under the Workmen's Compensation Act.

K. K. Sridharan for Appellant.

S. Mohan Kumaramangalam and *A. Mahadevan* for Respondent.

R.M. ——— *Appeal dismissed.*

Satyanarayana Rao, J. Venkataramanna *v.* Gopal Rao.
29th January, 1953. S.A. Nos. 949 and 950 of 1949.

Madras Estates Land Act (I of 1908), *section* 3 (15), *explanation and section* 4*—Ryot—Meaning of—Liability to pay rent—Permanently settled estate—If could be added to or diminished in extent by act of parties.*

Under section 3 (15) explanation, Madras Estates Land Act, a person who is in continuous possession of a ryoti land for a period of twelve years is deemed to be a ryot even if the occupation was adverse to the landholder. If he became a ryot by virtue of the explanation his liability to pay rent in respect of the land in his possession is undisputed because of section 4 of the Act. The right of a landholder to collect rent cannot be extinguished by non-payment of rent for a period of 12 years. It is not possible under the law to exclude or add to the land in a permanently settled estate by act of parties.

P. Somasundaram for Appellant.

D. Narasaraju and *K. B. Krishnamurthi* for Respondents.

R.M. ——— *Appeals allowed. Case remanded.*

Ramaswami, J. Manikyam *v.* Atchamma.
2nd February, 1953. S.A. No. 1575 of 1947.

Evidence—Presumption—Marriage—Presumption as to validity—Direct evidence unsatisfactory—Long lapse of time—If could rebut the presumption.

The law presumes the validity of a marriage ceremony. There is in law a presumption in favour of marriage and against concubinage when a man and a woman have cohabited continuously for a number of years. The mere fact that the direct evidence of the marriage which took place many years ago is unsatisfactory cannot displace this presumption.

B. V. Ramanarasu for Appellant.

P. Sithikanta Sastri for Respondents.

R.M. ———

Ramaswami, J. Moidinkunhi Beavy *v.* Gopalakrishna Mallaya.
4th February, 1953. S.A. No. 215 of 1948.

Easements—Natural rights and easements—Distinction—Right to light and air—When an easementary right—Right to enforce against trespassers.

The right to light and air may be either a natural right forming one of the incidents of property or it may be an easement. Natural rights are by law annexed to, and are inherent in, land *exjure naturae* and exist *prima facie* in all cases as between a landowner and his neighbour; they are rights *in rem* and enforceable against all who may violate them. Natural right though resembling easements in some respects are clearly distinguishable from them. The essential distinction appears to lie in this that easements are acquired restrictions of the complete rights of property or to put it in another way, acquired rights abstracted from the ownership of one man and added to the ownership of another ; whereas natural rights are themselves part of the complete rights of ownership, belong to the ordinary incidents of property and are *ipso facto* enforceable in law. Natural rights are themselves subject to restriction at the instance of easements. In the case of an easementary right there is no distinction in case of interference with light and air about the adjoining occupier being either a trespasser or an owner.

B. Pocker and *P. A. Q. Meeran* for Appellants.

K. Vittal Rao for Respondents.

R.M. *Appeal dismissed. No leave.*

Venkatarama Ayyar, J. Nanjamma *v.*
5th February, 1953. Rangappa.
S.A. No. 1027 of 1949.

Transfer of Property Act (XV of 1882), *section* 53*—Scope of—Actual indebtedness at the time of transfer—If necessary—Effect of declaring a transfer void under—If annuls the transaction altogether—Proof required to avoid a transaction.*

It is undoubted law that when a transfer is declared void as against creditors under section 53 of the Transfer of Property Act, the result is not to annul it altogether, but only to render it inoperative as against creditors and that too only to the extent necessary to satisfy their claims, and subject to their claims the transaction is valid and enforceable. (Story's *Equity Jurisprudence*, section 371, cited with approval). A creditor having the right to avoid a transaction under section 53, Transfer of Property Act, can do so by any act which shows clearly and unambiguously an intention to avoid it. The right to avoid does not depend on the ability to establish fraud in a court of law, though its practical worth will be nothing without it.

It is well settled that when a decree-holder entitled to avoid a transfer of property under section 53 of the Transfer of Property Act has elected to do so by bringing the properties to sale in execution of his decree, that avoidance enures for the benefit of the auction purchaser, notwithstanding that he is not himself a creditor or a transferee.

It is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement to make it fraudulent, for if a man does it with a view to his being indebted at a future time it is equally fraudulent and ought to be set aside.

A. Bhujanga Rao and *D. R. Krishna Rao* for Appellant.

T. R. Srinivasan for Respondents.

R.M. *Appeal dismissed. No leave.*

Rajamannar, C.J.
6th February, 1953.

Sadasivayya *v.* Venkataramana & Co.
S.A. No. 1266 of 1949.

Contract—Damages for breach of—Contract illegal and unenforceable—Subsequent promise to pay damages—If enforceable.

Damages for breach of a void and illegal contract cannot form the consideration for a promise to pay them. Where a contract in groundnut oil is prohibited in the Vegetable Oil and Oil Cakes (Forward Contracts Prohibition) Order, 1944, a contract in contravention of such a prohibition is an illegal contract and any subsequent promise to pay damages for its breach is not enforceable.

Ch. Suryanarayana Rao for Appellant.

K. Kotayya for Respondent.

R.M. *Appeal dismissed.*

Rajamannar, C.J.
13th February, 1953.

Venkatakrishna Reddi *v.* Govindaraja Mudaliar.
S.A. Nos. 1005 to 1009 of 1949.

Practice—Suit for rent—Joint owner or a co-sharer—If could sue for proportionate rent—Agreement to pay and receive proportionate rent—Exception to rule—How proved.

It must be taken as well established that a joint owner or a co-sharer is not entitled as such to sue for proportionate rent; but it has been held that though this is undoubtedly the established rule, nevertheless, if the parties, namely, the landholders and the tenant agree to accept and pay proportionate rent according to shares, there is nothing illegal in such an arrangement. There can be an exception to the general rule where there is an agreement between the parties and presumably this agreement can be proved in one or other of the ways known to law.

A.I.R. 1936 Mad. 402, followed.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Appellant.

A. K. Muthuswami Aiyar for Respondent.

R.M. *Case remanded.*

Mack, J.
13th February, 1953.

Mahalaxmamma *v.* Ramayya.
A.A.O. No. 659 of 1949.

Code of Civil Procedure, (*V of* 1908), *section* 47—*Scope of—Application in execution—Parties against whom no relief is claimed in the suit itself—If their rights could be agitated in execution under section* 47—*Practice.*

In order to bring the applications in execution within the scope of section 47 two conditions must be satisfied. First is that it must be a question arising between the parties to the suit in which the decree was passed. The second is that it must relate to the execution, discharge or satisfaction of the decree. The word 'and' in this connection in section 47 (1) appears to be highly significant. It would be opening an avenue of abuse if a plaintiff were to include as defendants in a suit quite improperly, persons who are really unnecessary, and while not being able to have any issue decided as between him and them in the suit itself, be permitted to pursue remedies against them in execution under section 47, Civil Procedure Code and have them determined without the payment of any court-fee. No doubt, it is always open to the executing Court to treat any proceedings under section 47 as a suit and, if necessary, order payment of any additional court-fee.

P. V. Chalapathi Rao for Appellant.

B. V. Ramanarasu for Respondent.

R.M. *Appeal allowed. No leave.*

Ramaswami, J.
16*th February*, 1953.

Kunhi Laxmiamma *v.*
Chinnamani *alias* Parvathi Kutty Amma.
S.A. No. 1109 of 1949.

*Malabar law—Adoption—Powers of the karnavan—Adoption—Only secular—Adoptee—If loses all rights in the natural family—Customary law—Surrender of such rights—*Attaladakkam—*Meaning of.*

A karnavan has the right and is perhaps under a duty to adopt females to the tarwad when necessary to preserve it. The reasons and objects of an adoption are wholly secular and not religious. As to whether as a rule the persons adopted lose their rights in their natural family or only gain rights in the family into which they were adopted without losing any of those rights has not yet been finally decided. The law applicable being customary the question can be decided by having recourse only to evidence of custom. It will be open to the adoptee to give up all the rights in the natural thavazhi and reserve only *attaladakkam* rights. This form of succession known as *attaladakkam* literally means, taking on extinction. It is defined as the right of succession by virtue of distant relationship to a divided branch of a tarwad when that branch becomes extinct.

M. K. Nambiar for Appellant.

S. Venkatachala Sastri and *C. F. Louis* for Respondents.

R. M.

Subba Rao, J.
17*th February*, 1953.

Singara Moopan *v.*
Venugopal Pillai.
S.A. No. 854 of 1948.

Contract—Specific performance—Pleadings—Suit by plaintiff—Readiness and willingness to perform the contract by the plaintiff—If plaintiff is absolved from the duty to aver in the plaint—Defendant repudiating the contract—Effect.

A plaintiff in an action for specific performance of a contract for the sale of land must plead that he is ready and willing to carry out the contract and repudiation of the contract by the defendant does not relieve the plaintiff from this obligation. When a party to a contract repudiates his obligation under it, the other party has two remedies. He may keep the contract open and sue for specific performance of the contract or he may accept the repudiation and file a suit for damages for breach of contract. If he elects to enforce the contract the condition precedent, *viz.*, readiness and willingness to carry out the contract, has to be fulfilled.

A.I.R. 1926 Cal. 181, doubted.

8 Bom.H.C.R. 123, distinguished.

G. R. Jagadisan for Appellant.

R. Gopalaswami Aiyangar for Respondent.

R.M.

Krishnaswami Nayudu, J.
19*th February*, 1953.

Sri Thiruvengada Ramanuja Jeer *v.*
Sri Perarulala Ramanuja Jeer Swamigal.
S.A. Nos. 2120 and 2121 of 1947.

Civil Procedure Code (V of 1908), section 9—Suit of a civil nature—What is—Suit to declare a right to certain honours—When can civil Courts entertain—Office of honour and performance of duties—Connection required to constitute suit of 'civil nature'.

Courts cannot take cognizance of actions where persons want to establish their rights to certain honours unconnected with any obligations or duty to perform any service. If the honours are claimed as attached inseparably to an office as part of its emoluments, then civil courts are entitled to make declaration of the rights to such honours. Without an office if one claims to be entitled to rights by virtue

of his eminent position as the head of a religious sect or otherwise of some importance in the field of religion quite unconnected with any kind of service which he could be compelled or obliged to perform, it will not be open to him to have such rights agitated in a civil court. Any honours which have to be treated not as mere honours but as emoluments must relate to or be connected with an office and the performance of a duty connected with the temple. Without that connection between the emoluments and the office it cannot be held that the rights arising out of the emoluments could form part of the subject-matter of a civil suit.

Case-law reviewd.

T. M. Krishnaswami Iyer and *M. Natesan* for Appellants.

K. E. Rajagopalachari, *K. E. Varadan*, *C. A. Vaidyalingam*, *K. Ramachandra Rao*, *M. Seshachalapathi*, *M. Chockalingam*, *K. S. Champakesa Iyengar*, *K. C. Srinivasan* and *S. V. Venugopalachari* for Respondents.

R.M. *Appeal allowed. No leave.*

Govinda Menon and Basheer Ahmed Sayeed, JJ.
19th February, 1953.

Padmanabha Bhatta *v.*
Ramachandra Rao.
S.A. Nos. 2 and 47 of 1949.

Limitation Act (IX of 1908), section 10—Applicability—Trust properties held by joint family—Division of the family—One member in charge of the trust religious duties—If other members could claim the properties adversely to the trust—Division of trust properties between the members—Effect of.

It has been held that the word 'person' in section 10 of the Indian Limitation Act includes a joint family and therefore if certain properties are impressed with the character of trust, the trustee family, by becoming sub-divided, cannot throw out that character. If by an arrangement in the family, one person is to discharge certain religious duties, that does not mean that the family as such renounced the trusteeship and the other members can claim to be holding trust properties adversely to the trust. It cannot be contended for a moment that by dividing the trust properties between themselves the members (of a joint family) have in any way disclaimed the interest of the trust in the properties.

70 M.L.J. 424, followed.

K. Srinivasa Rao for Appellants in S.A. No. 2 of 1949.

T. Krishna Rao for Appellant in S.A. No. 47 of 1949.

M. K. Nambiar and *A. Narayana Pai* for Respondents in both.

R.M. *Appeals dismissed.*

Ramaswami, J.
23rd February, 1953.

Pappikutty *v.*
Sankunni Nayar.
S.A. No. 965 of 1949.

Malabar Law—Karnavan—Dual capacities of—Community of property—If necessary to continue the relationship of karnavan and anandravan.

Even though the members of a tarwad may divide all the property, they still continue *karnavan* and *anandravan*. For purposes of pollution, for the performance of funeral ceremonies, for purposes of succession the relationship is recognised to subsist. Therefore such relationship will continue to be the source of obligations, social and religious, and can subsist between persons without any community of property. In other words the karnavan has two capacities—a temporal and a spiritual one. In the former, he is the manager of the family properties, maintains the junior members, represents the tarwad transactions with strangers, etc. In his

latter capacity he presides at the ceremonies and performs all the religious duties which are incumbent on him. A stranger cannot supplant him in this latter office.

M. K. Nambiar for Appellant.

D. A. Krishna Variar for Respondents.

R.M. *Appeal dismissed. No leave.*

Ramaswami, J.
25*th February*, 1953.

Public Prosecutor *v.*
Venkatasubba Rao.
C. A. No. 123 of 1952.

Criminal Procedure Code (*V of* 1898), *section* 417—*Powers of High Court under—Appeal against acquittal—Review of evidence—When permissible.*

Under section 417, Criminal Procedure Code, the High Court has full power to review the evidence upon which the order of acquittal was founded ; but it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial Court and the findings of the trial Court, which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons. Where the review of the evidence shows that the lower Court failed to draw the correct and clea rinferences from proved facts and the findings are clearly wrong and unreasonable though not perverse or foolish, the High Court will not hesitate to interfere and set aside the order of acquittal. When the views upon credibility are founded upon argumentative inferences from facts not disputed the Court of appeal is really in as good a position as the Trial Judge.

V. T. Rangaswami Aiyangar (Public Prosecutor) in person.

Adivi Rama Rao for Accused.

R.M. *Acquittal set aside.*

Krishnaswami Nayudu, J.
27*th February*, 1953.

Ramiah Pillai *v.*
Adhi Kesavalu.
A.A.O. No. 101 of 1952.

Code of Civil Procedure (*V of* 1908), *Order* 22, *rule* 3—*Application under—Condition requisite—Application to come on record in the place of a deceased plaintiff—If applicant should be a legal representative in the strict sense—Survival of the right to sue—Sufficiency.*

To entitle one to apply under Order 22, rule 3, it is necessary that he should first establish that he is a legal representative of the deceased plaintiff and then satisfy that the right to sue has survived over to him, when alone he could be allowed to bring himself on record and continue the suit. It is sufficient under Order 22, rule 3 if it is found that the right to sue survives to the applicant who desires to bring himself on record, though he may not strictly come within the definition of 'Legal Representative' under the Code.

In order therefore to entitle a person to bring himself on record as the legal representative or as a co-plaintiff to continue the suit, what he has previously to establish is that the right to sue has survived to him even though he may not be strictly the legal representative in the sense that he represents the estate of the deceased person.

T. R. Srinivasa Aiyangar, K. S. Desikan and *K. Raman* for Respondent.

R.M. *Appeal dismissed.*

[F.B.]

Rajamannar, C.J., Rajagopalan and Venkatarama Ayyar, JJ.
4th March, 1953.

The Crompton Engineering Co. (Madras), Ltd. *v.* The Chief Controlling Revenue Authority, Madras.

Case Ref. No. 61 of 1952 under section 57 of the Indian Stamp Act.

Stamp Act (II of 1899), section 2 (17)—Scope of—Document purporting to transfer—Invalid under the law—If liable to stamp duty.

That the transfer contemplated by section 2 (17) of the Indian Stamp Act is a transfer valid in law, should be obvious. A document may be an instrument, purporting to transfer a right in immovable property, though in law it could not and did not transfer that right. To make a document liable to stamp duty as a mortgage deed it is not enough if the document purports to effect a transfer. It must 'transfer'.

Messrs. King and Partridge for Applicant.

The Government Pleader (*P. Satyanarayana Raju*) for Respondent.

R.M. *Reference answered accordingly.*

Ramaswami, J.
4th March, 1953.

Adam Saheb *v.* Kuppuswami Pillai.
S.A. No. 453 of 1947.

Madras Estates Land Act (I of 1908), section (11) and section 12—Rent—If includes rent paid in respect of a lease of trees alone without the land—Section 12—Applicability.

The Madras Estates Land Act does not contemplate a patta for trees alone being held as a holding and the *vari* or rent payable under a patta for trees alone is not rent within the definition of section 3 (11) of the Act. Where trees, therefore, are leased out distinct from the land they are taken out of the purview of section 12 of the Act and the ryots are not entitled to the ownership of the trees.

T. Krishna Rao for Appellants.

Messrs. King and Partridge, M. Sundaram and *V. Pattabiraman* for Respondents.

Appeal dismissed.
R.M. *No leave.*

Ramaswami, J.
4th March, 1953.

Ranganathan *v.* Rajagopalan.

C.M.P. No. 6118 of 1952 in A.S. No. 257 of 1950.

Hindu Women's Rights to Property Act (XVIII of 1937), section 3 (2) and (3)—Widow's rights under—Nature and incidents of—Devolution on her death.

Under the Hindu Women's Rights to Property Act the widow is to be in the same position as a son excepting that her rights are subject to certain restrictions as regards alienation and that on her death the share goes, not to her stridhana heirs but to those who would inherit it had the last male owner, that is to say, the husband, died at the moment of her death. Mayne on *Hindu Law and Usage*, 11th Edn., pp. 708 and 712, cited with approval. A.I.R. 1951 Orissa 378 at p. 386, followed.

V. Seshadri and *K. S. Ramamurthi* for Petitioner.

S. Viswanathan for Respondent.

R.M. *Injunction application dismissed.*

Mack and Krishnaswami Naidu, JJ. Venkanna *v.* Narayanamma.
19th December, 1952. Appeal Nos. 236 and 661 of 1950.

Hindu Law—Stridhana property of a woman—Right of illegitimate daughter to succeed.

An illegitimate daughter of a Hindu woman is entitled to succeed to the stridhanam of the mother, though her right beyond succeeding to her mother's estate has not been recognised. Once it is held that there exists heritable blood between the mother and the illegitimate daughter, it is rather difficult to conceive how that ceases to exist beyond the mother, that is where she claims entitled to inherit her grandmother's estate.

I.L.R. 26 Mad. 509, followed ; (1937) 1 M.L.J. 28, distinguished ; I.L.R. 45 Bom. 597, doubted ; Case-law discussed; Texts considered.

Illegitimacy is no bar to succession to women's stridhanam. Whatever may be the rules regarding succession of illegitimate sons to their putative father's property in so far as illegitimate stridhana heirs are concerned, either daughter or daughter's daughter or son or son's son they would be entitled to succeed to their mothers' estate in preference to the other heirs.

P. Somasundaram and *D. Narasaraju* for Appellant in Appeal No. 236 of 1950.

E. Venkatesan and *D. L. Narasimha Raju* for 1st Respondent in Appeal No. 236 of 1950.

E. Venkatesan, P. Ramachandra Reddi and *D. L. Narasimha Raju* for Appellant in Appeal No. 661 of 1950.

D. Narasaraju and *K. B. Krishnamurthi* for 1st Respondent in Appeal No. 661 of 1950.

R.M.

Satyanarayana Rao and Balakrishna Ayyar, JJ. Ramaswami Pillai *v.* Muthuswami Pillai.
28th January, 1953. Appeal No. 165 of 1949.

Hindu Women's Right to Property Act (XVIII of 1937) *and the Hindu Women's Right to Property (Amendment Act) (XI of* 1938) *and Madras Act (XVI of* 1947)*—Extension to agricultural land—Validity.*

The effect of what is compendiously styled as "referential legislation" is to put the sections of a former Act into a latter Act just as if they had been written into it for the first time. This form of legislation was recognised and adopted with a view to extend the provisions of the two Central Acts (XVIII of 1937) and (XI of 1938) to agricultural lands in the Governor's provinces. On a reading of the sections themselves of the Madras Act (XVI of 1947) it is clear that the intention of the Legislature was to extend the provisions of the two Central Acts to agricultural lands and by implication they were actually so extended. It was not an attempt on the part of the Legislature to amend the Central Act and the Madras Act is valid and the provisions of the two Central Acts apply to agricultural land in the province.

K. S. Sankara Ayyar and *V. Sundaresan* for Appellants.

M. Natesan and *C. A. Seshagiri Sastri* for Respondents.

R.M. *Appeal dismissed.*

Mack and Krishnaswami Naidu, JJ. Rathinasabapathi Pillai *v.* Saraswathi Ammal.
29th January, 1953. Appeal No. 593 of 1949.

Hindu Women's Right to Property Act (XVIII of 1937), *section* 3 (2)*—Scope—Status of the widow if that of a coparcener—Hindu Law rights of the widow—If enlarged by the statute—Right to question alienations as a coparcener—Right of maintenance if taken away.*

The Hindu Women's Right to Property Act does not enlarge the rights of a widow except to the limited extent provided therein, namely, to ask for a partition of her husband's share which she would, however, be entitled to hold and enjoy as a Hindu women's estate, and her position and status in the joint family

is not in any way affected or varied by the enactment. She continues to be a member of the joint family and does not become a coparcener however much she might have become entitled to the interest which her husband possessed in the joint family properties.

The word 'interest' in section 3 (2) of the Act cannot mean that all the right, title and interest which her husband had, she became entitled to, including a right of action which he would have had to question an alienation if he had been alive. It only means the quantum of interest which the husband would be entitled to in the joint family properties.

The widow's general right to be maintained out of the joint family estate has not been taken by away by the Act, since there is no reference to it. Such a right is still available and the option would rest with her to claim maintenance or a share but not both.

M. S. Venkatarama Ayyar and *S. Nagaraja Ayyar* for Appellant.

K. R. Krishnaswami for Respondent.

R.M. —————— *Appeal dismissed.*

Satyanarayana Rao, J. Marudappa Thondaman *v.*
13th February, 1953. Chokalinga Thondaman.
S.A. Nos. 1357 and 1358 of 1949.

Practice—Power to compromise—If includes the power to refer to arbitration.

A power to compromise would undoubtedly carry with it the power to refer to arbitration as it is one of the modes by which a matter may be settled.

I.L.R. (1946) Nag. 824 (F.B.), followed.

K. Sundaralingam for Appellants.

K. S. Desikan and *K. Raman* for Respondent.

R.M. —————— *Appeals dismissed. No leave.*

Rajamannar, C.J. and Venkatarama Ayyar, J. Kunjammal *v.* Krishna Chettiar.
17th February, 1953. L.P.A. No. 124 of 1949.

Practice and Procedure—Decree capable of execution—Appellate decree supersedes that of the Court below—Only one decree in a suit capable of execution—Person against whom execution is sought not a party to the appeal—If would make any difference.

The law is well settled that when a decree is taken in appeal to a higher Court the decree passed in appeal supersedes that of the Court below and becomes a decree in the suit itself and that thereafter that is the only decree which is capable of execution and that period of limitation for execution would run from the date of that decree. It makes no difference whether the person against whom execution is sought is a party to the appeal or not, any more than whether the appeal related to the entire subject-matter of the suit or only to a part thereof. In either case on the principle that there can be only one decree in a suit it must be held that the only decree which is capable of execution is the decree passed in appeal.

B. V. Viswanatha Ayyar for Appellant.

K. Parasurama Aiyar for Respondent.

R.M. —————— *Appeal dismissed*

Rajamannar C.J. and Venkatarama Ayyar, J. A.M. S.S. V.M. & Co. *v.* State of Madras.
24th February, 1953. C.M.P. No. 4229 of 1951.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—Validity in so far as the Act relates to Fisheries—Scope of section 20.

The lease in favour of the petitioner relating to Chank fisheries in the gulf of Mannar and Palk Bay was terminated by the Government by a notice dated 13th March, 1951, issued under section 20 of the Madras Estates Abolition Act.

Held (i) the Act was not beyond the competence of the Madras Legislature in so far as it relates to Fisheries,

(ii) The Act was not incompetent as being legislation on Inter-state trade and commerce in so far is it relates to Fisheries.

(iii) The words 'such right' in the 2nd and 3rd provisos to section 20 refer only to the right dealt with in the body of the section and the 3rd proviso is a proviso to the section and not to the 2nd proviso. The true effect of the section is (*a*) Rights validly created before 1st July, 1945, will be valid. (*b*) Such rights, however, may be determined under the 3rd proviso if it is in the public interest to do so and in such cases compensation will be payable under section 20 (2) and (*c*). Rights created after 1st July, 1945, if they are for a period exceeding one year are liable to be avoided under the 2nd proviso.

M. R. M. Abdul Kareem for the Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) for first Respondent.

K. S. Sankara Iyer and *T. B. Balagopal* for second Respondent.

V.P.S. — *Petition dismissed.*

Ramaswami, J. G.-G. in Council represented by G.M.
25th February, 1953. Southern Ry. *v.* Sankarappa.
S.A. No. 1106 of 1952.

Civil Procedure Code (*V of* 1908), *section* 80—*Notice under—Object of—Essential of a notice under—Minor details—Errors in—If would render the notice improper or invalid.*

The object of section 80, Civil Procedure Code, is to give time for the Government to consider the whole matter and see whether it cannot be settled out of court and wasteful litigation avoided. The essential requirements of a notice under this are that the addressee should be identified and must have received the communication ; secondly, there should be no vagueness or indefiniteness about the person giving the notice and who must also be the person filing the suit and the notice must also give the details which are specified in that section and thirdly, two months' time allowed must expire before the suit is laid. Once these requirements are satisfied, minor details like the misdescription of the person to whom the communication is addressed would not make it an improper notice which does not comply with the requirements of section 80, Civil Procedure Code.

C. Govindaraja Iyengar instructed by *Messrs. King and Partridge* for Appellant.

Ch. Suryanarayana Rao and *Ch. Ramakrishna Rao* for Respondent.

R.M. — *Appeal dismissed. No leave.*

Ramaswami, J. Kutti *v.* Kunhammed.
26th February, 1953. S.A. No. 2303 of 1950.

Practice and Procedure—Suits for partition—Rule as to inclusion of all divisible properties—Exceptions to.

The rule that partition suits should embrace all the joint family properties is neither arbitrary nor technical and is founded on sound and weighty reasons. But this is the general rule and there are several exceptions which are equally well recognised. There cannot be a rigid rule requiring the dismissal of every type of suit for partition which does not embrace all the joint family properties.

S. Venkatachala Sastri for Appellant.

C. K. Viswanatha Iyer for Respondent.

R.M. — *Appeal dismissed.*

Balakrishna Ayyar and Chandra Reddi, JJ. Public Prosecutor *v.* C. Paramasivam.
2nd March, 1953. Crl. Rev. Case No. 862 of 1952.

Code of Criminal Procedure (*V of* 1898), *section* 162 *and Indian Evidence Act* (*I of* 1872), *section* 25—'*Police Officer*'—*Who is—Excise Officers empowered as Police Officers under Opium Act—If Police Officers—Admissibility of confession made before such Officers.*

In relation to an offence under the Opium Act a Prohibition Officer on whom the State Government has conferred the powers of an officer in charge of a Police Station, is a Police Officer for purposes of section 162 of the Criminal Procedure Code and section 25 of the Indian Evidence Act.

I.L.R. 51 Bom. 78 (F.B.) and I.L.R. 61 Cal. 607 (F.B.), followed.

I.L.R. 12 Pat. 46 (F.B.), dissented from.

There is no exhaustive definition of the expression 'Police Officer' in any of our statutes. In the absence of a statutory definition and where one is not expressly called a Police Officer, the next step is to ask what does the law require him to do? What are the duties imposed on him and what are the powers conferred on him? If they are substantially those of a Police Officer there need be no qualms in regarding him as one.

Per *Chandra Reddi, J.*—The term 'Police Officer' used in section 25 of the Evidence Act is with reference to the functions exercised by the officer and not as an officer of the Police department. It only means an officer exercising police powers and is not confined to an officer belonging to the police department.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) in person.

S. Govind Swaminathan and *S. Rajaraman* for the (Accused) Respondent.

R.M. *Revision dismissed.*

(F.B.)

Rajagopalan, Balakrishna Ayyar and Chandra Reddi, JJ. Nalla Buligadu, *In re.*
3rd March, 1953. Crl. Rev. Case No. 977 of 1951. Crl. R.P. No. 960 of 1951.

Criminal Procedure Code (V of 1898), sections 209 and 437—Order of discharge under—Revisability—Powers of the Court of Revision—When could be exercised—Termination of proceedings before the lower Court—If necessary.

It is competent for a District Magistrate or the Sessions Judge to revise an order of discharge by a Magistrate without waiting for the termination of the proceedings before the Magistrate. When a Magistrate discharges an accused in respect of an offence exclusively triable by a Court of Sessions and proceeds to try him himself for an offence within his jurisdiction on the language of section 437, Criminal Procedure Code, it will be open to the District Magistrate to direct the committal of the accused for trial " upon the matter of which he has been, in the opinion of the District Magistrate, improperly discharged ".

(Case-law reviewed.)

A.I.R. 1952 All. 231 (F.B.), dissented from.

I.L.R. 24 Mad. 136 and subsequent cases in Madras followed.

O. Chinnappa Reddy, P. Ramakrishna and *B. Prasada Rao* for Accused.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

R.M. *Petition dismissed.*

Satyanarayana Rao, J. Venkatasubbamma *v.* Narayanaswami.
5th March, 1953. S.A. No. 194 of 1951.

Gift—Deed of—Irrevocable—Conditions for—Acceptance of gift by donee—When complete—How proved—What constitutes sufficient acceptance.

If after the execution of a deed of gift, the deed was delivered to the donee, but the registration of the document took place later, the acceptance of the deed after the execution would complete the gift and make it irrevocable. The acceptance by the donee must, however, be during the lifetime of the donor. The fact that the deed was executed and registered would not make it irrevocable if in fact there was no acceptance by the donee either before registration but after execution or even after registration.

If there was no delivery of the deed and the possession of the properties to the donee it may be open to the donee to prove by cogent evidence that there were other modes of acceptance, for example, a letter written immediately after the execution of the document. Anterior negotiations or talks about the transfer of

property by way of gift would not amount to acceptance of the transfer of the property by gift. Acceptance may be implied but mere passive acquiescence such as standing by when the deed was executed or registered is no acceptance.

C. V. Dikshitulu and *N. Rajeswara Rao* for Appellant.

M. S. Ramachandra Rao and *M. Ramakrishna* for Respondent.

R.M.

Venkatarama Ayyar, J.
5th March, 1953.

Chinna Channayya *v.* Regional Inspector of Municipal. Councils, Vijayawada.
Writ Petition No. 130 of 1953.

Madras Village Panchayats Act (*X of* 1950), *section* 8 (1)—*Reservation of seats—Regional Inspector—If bound to reserve seats—Duty or discretion—Writ of* mandamus *to compel an Inspector to reserve seats—If could lie.*

It is a condition precedent to the grant of a writ of *mandamus* that the party against whom it is sought must be shown to be under a duty to do that which it is charged with having failed to do.

Section 8 (1) of the Madras Village Panchayat Act, 1950, does not impose any duty on the Regional Inspector to reserve seats for members of the Scheduled Castes but it is only a matter of discretion. Section 8 (1) of the Act does not impose a duty, but only confers a power.

N. V. B. Shankar Rao for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) for the State.

R.M. *Petition dismissed.*

Chandra Reddi, J.
5th March, 1953.

James Manickam *v.* Jaya Narayan Daga.
C.R.P. No. 1686 of 1952.

Civil Procedure Code (*V of* 1908)—*Order* 37, *rule* 2 *and Schedule B—Form* 4—*Summary suit—Leave to defend—Application out of time—If Court can extend the time—Section* 5, *Limitation Act—Applicability.*

When a period has been fixed for the purpose of doing an act or taking a proceeding under the statute of Limitations or under any other enactment, Courts do not possess the power to extend the time unless and until such a power is specifically conferred on them.

Order 37, Civil Procedure Code, does not contain any provision for extending the time prescribed in the summons in form No. 4, Schedule B of the Code. Nor has section 5 of the Limitation Act been extended to this chapter of the Civil Procedure Code. The City Civil Court, to which Order 37, Civil Procedure Code applies, has no power to condone the delay in filing and obtaining leave to defend suits filed under Rule 2 of Order 37, Civil Procedure Code.

Messrs. *Jan* and *San* for Petitioner.

V. Krishnaswami for Respondent.

R.M. *Petition dismissed.*

Ramaswami, J.
9th March, 1953.

Katheesa *v.* Assema.
S.A. No. 1102 of 1949.

Indian Registration Act (*XVI of* 1908), *section* 17 (*vi*)—*Amendment Act XXI of* 1929—*If has retrospective effect—Compromise decree affecting immovable property—prior to* 1929—*If requires registration.*

Section 17 (*vi*) of the Indian Registration Act, amended by Act XXI of 1929, has no retrospective effect. Also a decree affecting immovable property, which is the subject-matter of a compromise and which is also the subject-matter of the suit, need not be registered. Hence a pre-1929 compromise which has been recorded and which covers immovable property need not be registered.

M. C. Sridharan for Appellant.

V. P. Gopalan Nambiar for Respondent.

R.M. ——— *Appeal dismissed. No leave.*

Rajamannar, C.J. and Venkatarama Ayyar, J. 10*th March*, 1953.

Veerappa Pillai *v.* Rathnaswami Nadar. L.P.A. No. 299 of 1952.

Motor Vehicles Act (IV of 1939), section 47—Issue of Permit—Matters which can be taken into consideration—Benefit of the public—Guiding factor—Previous experience—If a criterion—Policy of preferring small operators—If inherently bad.

It should be a material consideration to take into account that the appellant has experience of a particular route over which the stage carriage has to be run and that such a consideration is not out of place in deciding to whom, in the interest of the public, the stage carriage permit should be granted. Section 47 does not prescribe rules for selection when there are several applicants for the grant of a stage carriage permit. Therefore, in making the selection the authorities ought to be guided by what is for the benefit of the public. It cannot be said that the policy of preferring small operators is inherently bad, as not being in the interests of the public.

M. K. Nambiar, G. R. Jagadisan and *S. Somasundaram* for Appellant.

Messrs. John and *Rao* for Respondent.

R.M. ——— *Appeal dismissed.*

(F.B.) *Rajamannar, C.J., Rajagopalan and Venkatarama Ayyar, JJ.* 12*th March*, 1953.

Rajamannar and Others, *In re.* S.R. No. 9132 of 1952.

Court-fees Act (VII of 1870), section 7 (iv-a) and Article 17-A (i) of Schedule II (as amended in Madras)—Rule 2 of the Rules framed by the Madras High Court under section 9 of the Suits Valuation Act—Effect of—Rule if applicable to cases where fixed court-fee is leviable—Construction of Rule.

Prima facie a suit for a mere declaration that a compromise decree is not binding on a plaintiff and where no consequential relief is prayed for would fall under Article 17-A (i) of Schedule II of the Court-fees Act.

It is not correct to so construe section 9 of the Suits Valuation Act as to confer a power on the High Court to provide for a separate class of suits not falling within any of the classes mentioned in the body of the Court-fees Act or in the schedules. Nor can a rule framed under section 9 of that Act provide whether court-fee should be calculated on an *ad valorem* basis or on a a fixed basis. Section 9 of that Act deals with that class of suits which does not admit of being satisfactorily valued and provides that the High Court may provide for the valuation of such suits. It does not interfere in any manner with the scheme relating to classification of suits provided in the body of the Court-fees Act and its schedules. If the rule were to be construed to have this effect, it would be in excess of the powers conferred by section 9 of the Suits Valuation Act.

In a suit filed to obtain a declaratory decree where no consequential relief is prayed, which does not fall within the category of suits provided for by section 7 (*iv-a*) of the Court-Fees Act, court-fee is not leviable on an *ad valorem* basis on the value of the subject-matter of the suit computed in accordance with Rule 2 of the rules framed by the High Court under section 9 of the Suits Valuation Act, in 1943.

W. Kothandaramayya for Appellant.

The Government Pleader (*P. Satyanarayana Raju*) for Respondent.

R.M. ——— *Reference answered accordingly.*

Rajamannar, C.J. and Venkatarama Ayyar, J. — Venkata Subba Rao *v.* Lakshminarasamma.
23rd January, 1953. — Appeal No. 393 of 1947.

Hindu Law—Joint family—Life insurance policy of one of the members—Presumption as to being his separate property—When insurance policy amount can be treated as joint family asset.

Having regard to the modern social conditions the general presumption must be that when one of the members of a joint family insures his life the amount of the policy belongs to the assured as his separate property and does not become a joint family asset. No doubt, if there is a clear indication that the member did not intend to treat it as his separate asset, the position would be different. In a case where each of the several members of the family has taken a policy in his name the presumption becomes stronger that the policies were not part of the joint family assets.

M. S. Ramachandra Rao and *M. Krishna Rao* for Appellants.

V. Rangachari, P. V. Chelapathi Rao, T. M. Krishnaswami Ayyar and *M. V. Nagaramiah* for Respondents.

R.M.

Govinda Menon, J. — K. K. P. Thavazhi *v.* Sree Devi.
27th February, 1953. — S.A. No. 1671 of 1948.

Malabar Law—Karnavan—When ceases to represent the family.

It is settled law that unless a karnavan had renounced his powers, or by a regular family karar entrusted the management to some other member of the tarwad, the karnavan would not lose his rights to represent the family.

N. Sundara Ayyar for Appellants.

M. K. Nambiar for Respondents.

R.M. — *Decree modified. Appeal dismissed.*

Ramaswami, J. — Syed Useni *v.* Munuswami Nainar.
5th March, 1953. — S.A. No. 1506 of 1949.

Civil Procedure Code (V of 1908), section 47—Scope—Application under—Converted into a suit—Executable decree—Remedies under—If could be pursued by independent proceedings.

Where a decree is executable the relief can only be worked out in execution and not by means of a separate suit either independently or by conversion as contemplated under section 47 (2) of the Code of Civil Procedure and the period of limitation is three years from the date of decree.

Case-law reviewed.

S. Thyagaraja Ayyar for Appellants.

M. S. Venkatarama Ayyar for Respondent.

R.M. — *Appeal dismissed.*

Rajamannar, C.J. and Venkatarama Ayyar, J. — Meenakshi Mills, Ltd., Mathurai *v.*
6th March, 1953. — Labour Appellate Tribunal, Bombay.
L.P.A. No. 148 of 1952.

Industrial Disputes (Appellate Tribunal) Act (XLVIII of 1950), *section* 7 (2) (*b*)—*Conciliation Proceedings—Meaning of—Writ of* certiorari *against erroneous decision of Appellate Tribunal—If available.*

The term 'Conciliation Proceedings' though not defined in the Industrial Disputes Appellate Tribunal Act, must be understood to refer to the Conciliation Proceedings mentioned in the Industrial Disputes Act. Section 2 (*e*) of the Industrial Disputes Act defines Conciliation Proceedings as meaning any proceeding held by a conciliation officer or Board under the Act.

The words 'the settlement arrived at between the parties in the course of Conciliation Proceeding' mentioned in section 7 (2) (*b*) of Act XLVIII of 1950 refers to the settlement arrived at in the course of Conciliation Proceedings under the Industrial Disputes Act.

N R C

The High Court cannot under Article 226 of the Constitution convert itself into a court of further appeal from the Appellate Tribunal. No *certiorari* is available to quash a decision passed with jurisdiction by an inferior tribunal on the mere ground that such decision is erroneous.

N. Rajagopala Ayyangar, K. Subramaniam and *Alladi Kuppuswami* for Appellant.

Arunachalam, Jagannadhadas & Co., and The Government Pleader (*P. Satyanarayana Raju*) for Respondents.

R.M. ——— *Appeal dismissed.*

[Full Bench]

Rajamannar, C.J., Rajagopalan and Venkatarama Ayyar, JJ. *6th March*, 1953.

Abdul Rahman Sahib *v.* Mohd. Siddiq. C.R.P. No. 1785 of 1949.

Arbitration Act (X of 1940), *section* 47—*Proviso—Applicability—Award—When could be made the basis of a decree under Order* 23, *rule* 3, *Civil Procedure Code.*

Under the Proviso to section 47 of the Arbitration Act an arbitration award obtained otherwise than in proceedings taken in accordance with the Act cannot without more be recognised as a compromise or adjustment of the suit. No decree can be passed thereon under the provisions of Order 23, rule 3, Civil Procedure Code.

I.L.R. (1946) Mad. 39 : (1945) 1 M.L.J. 463, overruled.

But, if after an award is made, the parties thereto agree to accept it, that will be a compromise and a decree based thereon could be passed under Order 23, rule 3.

Case-law discussed.

K. S. Desikan for Appellant.

K. G. Srinivasa Ayyar for Respondents.

R.M. ——— *Revision allowed.*

Mack, J. *12th March*, 1953.

Chengama Naidu *v.* Velayudha Mudaliar. A.A.O. No. 313 of 1949.

Madras Agriculturists' Relief Act (IV of 1938), *sections* 23 *and* 24—*Scope and effect of—Sale set aside under—Right of a* bona fide *purchaser to get back the sale price paid by him—Inherent right of Courts to protect suitors before it from harm by its own acts.*

Sections 23 and 24 of Act IV of 1938 leave unimpaired the inherent right of the Court to see that any suitor before it is not injured by its own act or by a decision which is reversed by a Court of appeal, when the party before it is a *bona fide* auction purchaser for valuable consideration. (1941) 2 M.L.J. 1060, distinguished.

The only consequence laid down in section 23 when a sale is set aside is that it "shall be deemed not to have taken place at all". Under section 24 a purchaser shall be entitled to an order for payment of any purchase money paid by him against the person to whom it has been paid where a sale is set aside under section 23 or section 23-A of the Act.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Appellant.

R. Gopalaswami Aiyangar, K. Rajah Ayyar and *M. Natesan* for Respondents.

R.M. ——— *Appeal allowed.*

Venkatarama Ayyar, J. *12th March*, 1953.

Kandaswami *v.* Dy. Registrar of Co-operative Societies, Coimbatore. W.P. No. 1 of 1953.

Madras Co-operative Societies Act (VI of 1932)—*Registrar of Co-operative Society—Duties of—When administrative and when judicial—Writ of* Certiorari *to quash departmental communication—If could lie.*

Under the general scheme of the Co-operative Societies Act the functions of the Registrar with reference to Co-operative Societies under the Act are both administrative and judicial. The Registrar has to arrange for audit of the accounts of the societies and for inspection of their work. He has also powers to supersede the committee, to dissolve the society and direct its winding up. All these are purely of an administrative character. The provisions for the reference to arbitration of

disputes and the conduct of arbitration, etc., are judicial functions involving the adjudication of civil rights of parties.

No writ of *certiorari* is admissible to quash a purely departmental communication, which cannot be regarded as a judicial or quasi-judicial order.

Row and Reddi and *S. Mohan Kumaramangalam* for Appellants.

The Government Pleader (*P. Satyanarayana Raju*), *K. Rajah Ayyar* and *C. S. Vidyasankaran* for Respondents.

R.M. —————— *Petition dismissed.*

Govindan Menon and Basheer Ahmed Sayeed, JJ. Kuttyai Lakshmi *v.*
12th March, 1953. Puthia Purayil.
A.A.O. No. 76 of 1949.

Malabar Law—Gift to a member of a tavazhi—Presumption as to tarwad property.

It is now settled law that if a gift is made to an entity which constitutes a tavazhi as such, then the presumption is that the donor intends that the gift should have all the incidents of tarwad property attached to it.

(1946) 2 M.L.J. 175 : I.L.R. (1947) Mad. 272 at 293, differed.

(1939) 1 M.L.J. 604, distinguished.

If the donees constitute a natural group according to the Marumakkathayam Law capable of acquiring and owning property, there is no reason why this presumption should not be applied to them. The degree of propinquity between the donors and the donees is immaterial and affords no test. Where a Marumakkathayam donor gives properties to the children of the same mother or to a member of a tavazhi without any express indication that an absolute alienable estate was granted, the presumption is that the donor intended to confer only an estate with all the incidents of tarwad property.

(1915) 29 M.L.J. 481 : I.L.R. (1915) 39 Mad. 317 (F.B.), followed.

A. Achuthan Nambiar for Appellant.

K. Kuttikrishna Menon and *V. Balakrishna Eradi* for Respondents.

R.M. —————— *Appeal dismissed.*

Satyanarayana Rao and Rajagopalan, JJ. Rakkiyana Gounder *v.*
13th March, 1953. Chinnu Goundan.
S.A. No. 1167 of 1949.

Evidence Act (I of 1872), section 92—Proviso 2—Scope of—Oral evidence to 'add to' the terms of a document—When inadmissible.

A contemporaneous oral agreement which has the effect of reducing a sale to a mortgage is not provable in view of section 92 of the Evidence Act. If, however, the parties did not seek to establish a mortgage by oral evidence but intend to prove an oral agreement to reconvey, which is a distinct transaction, Section 92 of the Evidence Act does not stand in the way. If the arrangement pleaded amounts to a single transaction of the nature of a mortgage, and if the agreement to reconvey is oral it is hit at by section 92 of the Evidence Act. The words 'adding to' occurring in section 92 of the Evidence Act contemplates the addition to the terms of the sale deed and not a collateral matter, which is added on by the agreement.

P. S. Kailasam and *M. S. Sethu* for Appellant.

N. Rajagopala Ayyangar for Respondent.

R.M. —————— *Appeal allowed. Case remanded.*

Govinda Menon, J. Srinivasan *v.* Bukthavatsalu Naidu.
13th March, 1953. C.R.P. No. 2199 of 1951.

Civil Procedure Code (V of 1908), Order 37, rule 2—Summary suits—Leave to defend—Power of Court to extend time—Limitation Act—Article 159—Applicability.

It is true that there is no specific provision in Order 37, rule 2, Civil Procedure Code, or in the Limitation Act empowering a Court to condone a delay in appearance beyond the ten days prescribed by the summons in Form No. 4 of Schedule B, Civil Procedure Code. But if the Court has passed no decree it clearly has ample

discretion to give the defendant such leave, notwithstanding the fact that he has not appeared within ten days of the service of the summons on him in Form No. 4, Appendix B of the Code.

(1949) 1 M.L.J. 514, approved.

It is somewhat incongruous that a court which, after passing a decree on default of appearance can set aside the same should have no power, before passing the decree to extend the time for applying for leave to defend.

The period of ten days fixed under Article 159 of the Limitation Act is not an inflexible one. It can be construed only as prescribing the period of ten days when the summons does not specifically fix a date for the hearing.

Sundararajan and *Sivaswami* for Appellants.

A. K. Muthuswami Ayyar for Respondent.

R.M. —————— *Revision allowed.*

Venkatarama Ayyar, J. Subbaraj *v.* Muthia.
13th March, 1953. W.P. No. 881 of 1952.

Representation of the People Act (XLIII of 1951), section 85—Powers of Election Commission under—Provisions if mandatory—Election Tribunal—If subordinate to Election Commission—Civil Procedure Code (V of 1908)—Applicability—Powers of amendment to Tribunal.

On the true construction, section 85 of the Representation of the People Act does not make it imperative on the part of the Election Commission to dismiss an election petition for defective verification and secondly, whatever might be the powers of the Election Commission under section 85 when once the matter comes before the Tribunal, it is thereafter governed by section 90 (4) of the Act and under this section the Tribunal has a discretion in the matter of dismissing the petition for non-compliance with the requirements, of section 83.

The use of the word " shall " in section 85 is not conclusive and the intention of the Legislature must be gathered on a reading of the enactment as a whole. The fact that the Tribunal is given a discretion under section 90 (4) goes far to support the view that section 85 should not be construed as mandatory. The cumulative effect of the provision in section 85, proviso, section 83 (3) and section 90 (4) is to lead to the conclusion that the words " shall dismiss " in section 85 should be construed as meaning " shall have the power to dismiss ".

Under section 83 (1) which makes Order 6, Civil Procedure Code, applicable to election petitions, a defective verification is a mere irregularity and does not affect the jurisdiction.

Even assuming that the only jurisdiction of an Election Commission was to dismiss a petition under section 85 still when once the matter comes up before the Tribunal under section 86, thereafter the powers of the Election Tribunal are those which are conferred on it by the statute and such powers are not controlled by the limitations on the powers of the Election Commission under the Act. The Election Tribunal is in no sense a body subordinate to the Election Commission. Both are two independent bodies operating in the same field but at different stages and with different powers.

The question whether Order 6, rule 17, Civil Procedure Code, is as such applicable to proceedings before the Election Tribunal is not free from doubt. Section 83 (3) permits only amendment of particulars included in the list or the inclusion of better particulars in regard to any matters referred to in the list and that would seem to negative a general power of amendment which the civil courts possess under Order 6, rule 17, Civil Procedure Code. Every Tribunal has inherent jurisdiction to permit clerical and formal amendments.

K. V. Venkatasubramania Ayyar, A. V. Narayanaswami Ayyar and *R. Venkatachalam* for Appellant.

The Government Pleader (*P. Satyanarayana Raju*), *B. V. Subrahmanyam, V. V. Krishnamurthy, R. Chockalingam* and *M. S. Appa Rao* for Respondents.

R.M. —————— *Petition dismissed.*